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IN THE
SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

JAMES LYNN STYERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Capital Case

QUESTIONS PRESENTED

In December 1989, James Lynn Styers took 4-year-old Christopher Milke into the desert and shot him three times in the back of the head. On direct appeal, the Arizona Supreme Court found one aggravating circumstance invalid and re-weighed the remaining aggravating circumstances and proffered mitigation. In its independent review of Styers' death sentence, the Arizona Supreme Court explicitly stated that it had considered all of the proffered mitigating evidence, but found Styers' proffered mitigation not sufficiently substantial to warrant leniency and affirmed his death sentence. *State v. Styers*, 177 Ariz. 104, 117, 865 P.2d 765, 778 (1993).

A panel of the Ninth Circuit concluded that the Arizona Supreme Court failed to properly re-weigh the mitigation evidence pursuant to *Clemons v. Mississippi*, 494 U.S. 738, 748–49 (1990), because it failed to consider Styers' post-traumatic stress disorder mitigation. *Styers v. Schriro*, 547 F.3d 1026, 1035–37 (9th Cir. 2008) (Pet. App. A, at 19–20.)

1. Under the Anti-terrorism and Effective Death Penalty Act (AEDPA), when a State's highest court explicitly states it has considered proffered mitigation evidence, must a habeas reviewing court accept that statement, absent clear and convincing evidence to the contrary?

2. This Court has clearly established that a State cannot preclude a capital sentencer from

considering or giving effect to relevant mitigation evidence. *Smith v. Texas*, 543 U.S. 37, 45 (2004); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). Here, in considering the proffered mitigation evidence of post-traumatic stress disorder, the Arizona Supreme Court elected to give Styers' evidence no significant mitigating weight because he could not connect his alleged condition to his murderous act. Did the Ninth Circuit violate this Court's jurisprudence by holding that *Smith* forbids a sentencer from relying on the absence of a causal nexus between an alleged mental condition and the crime committed in deciding how much weight to give the proffered mitigation evidence?

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OPINION BELOW

A panel of the United States Court of Appeals for the Ninth Circuit (Chief Judge Kozinski, and Judges Farris and Bea) held in a per curiam decision that the Arizona Supreme Court failed, after invalidating an aggravating factor, to properly re-weigh the mitigation evidence with the remaining aggravating factors as required by *Clemons v. Mississippi*, 494 U.S. 738, 748–49 (1990). *Styers v. Schriro*, 547 F.3d 1026, 1035–36 (9th Cir. 2008) (Pet. App. A, at 19–20.) The panel decision reversed a decision by the United States District Court for the District of Arizona. *Styers v. Schriro*, 2007 WL 86944 (D.Ariz. Jan. 10, 2007); *see also State v. Styers*, 177 Ariz. 104, 865 P.2d 765 (1993).

STATEMENT OF JURISDICTION

The Ninth Circuit denied Petitioner's request for rehearing en banc on December 11, 2008. This petition for writ of certiorari is timely filed within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2 and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution states, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

In early December 1989, Styers shot and killed Christopher Milke, the 4-year-old son of Debra Milke, the woman with whom he shared an apartment. Following a jury trial, Styers was convicted of first-degree murder, conspiracy to commit first-degree murder, child abuse, and kidnapping. The trial court found three aggravating circumstances: the victim was under the age of 15, A.R.S. § 13–703(F)(9); the murder was committed in expectation of pecuniary gain, A.R.S. § 13–703(F)(5); and the murder was committed in an especially heinous and depraved manner, A.R.S. § 13–703(F)(6). After considering all proffered mitigating evidence, the trial court found the mitigation was not sufficiently substantial to call for leniency, and sentenced Styers to death. *State v. Styers*, 177 Ariz. 104, 109, 865 P.2d 765, 770 (1993).

On direct appeal, the Arizona Supreme Court reversed the finding of the pecuniary gain aggravating circumstance. The state court found that there was insufficient evidence that Styers' co-defendant, Debra Milke, agreed to pay Styers to murder her 4-year-old son. 177 Ariz. at 115, 865 P.2d at 776. The court nevertheless upheld Styers' death sentence after independently reviewing the remaining aggravating

circumstances and the mitigation evidence proffered by Styers:

> The special verdict stated that none of the statutory mitigating circumstances were proven and found no nonstatutory "mitigating circumstances sufficiently substantial to call for leniency." Defendant argues that the following facts constitute mitigating evidence that warrants leniency: no prior criminal record; honorable discharge from United States Marines after serving in Vietnam; evidence that defendant suffered from post-traumatic stress syndrome; defendant cared for Christopher; and the giving of a felony murder instruction.
>
> Defendant had no prior convictions for either misdemeanors or felony offense. This is relevant mitigating evidence. *See State v. Rossi (Rossi III),* 171 Ariz. 276, 279, 830 P.2d 797, 800, *cert. denied,* 506 U.S. 1003, 113 S.Ct. 610, 121 L.Ed.2d 544 (1992). Defendant's service in Vietnam and honorable discharge are also relevant mitigating circumstances. *See State v. Lavers,* 168 Ariz. 376, 396, 814 P.2d 333, 353, *cert. denied,* 502 U.S. 926, 112 S.Ct. 343, 116 L.Ed.2d 282 (1991). Defendant also suffered from post-traumatic stress disorder prior to and around the time of the murder as a result of his combat service in Vietnam. This could also, in an

appropriate case, constitute mitigation. *See State v. Bilke,* 162 Ariz. 51, 53, 781 P.2d 28, 30 (1989) (finding evidence of post-traumatic stress disorder constituted newly-discovered evidence that may have affected sentencing). However, two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the conspiracy and the murder.

There was testimony that defendant cared for Christopher at times, but his actions and participation in his murder speak volumes to that. Finally, giving a felony murder instruction "is not relevant 'where the defendant intended to kill the victim or where the defendant knew with substantial certainty that his conduct would cause death.'" *State v. Gillies,* 135 Ariz. 500, 513, 662 P.2d 1007, 1020 (1983) (quoting *State v. Zaragosa,* 135 Ariz. 63, 659 P.2d 22, *cert. denied,* 462 U.S. 1124, 103 S.Ct. 3097, 77 L.Ed.2d 1356 (1983)). The defendant conspired to kill Christopher and then he killed him. The fact that the court gave a felony murder instruction is not mitigating here.

Because the trial court did not list each of the proffered items of claimed mitigation and state that it found them unavailing does not mean that the trial court did not consider them. It is apparent that the trial court considered this evidence, but

> ultimately found that it was not sufficiently substantial to call for leniency. We will also *consider* it in our independent review.
>
> . . .
>
> This court independently reviews aggravating and mitigating circumstances to determine whether the death penalty was properly imposed. *See Rossi*, 171 Ariz. at 278, 830 P.2d at 799. We have excluded from our consideration pecuniary gain, having found the evidence does not prove that factor beyond a reasonable doubt. We have *considered* all of the proffered mitigation and, like the trial court, find it is not sufficiently substantial to warrant leniency.

177 Ariz. at 116–17, 865 P.2d at 777–78. (Emphasis added.)

After exhausting his state post-conviction review, Styers petitioned for a writ of habeas corpus in district court, raising a number of constitutional claims regarding his trial and sentencing proceedings. The district court denied his petition, but granted a certificate of appealability as to his claim that he received ineffective assistance of counsel. A panel of the Ninth Circuit expanded the certificate of appealability to include a claim that the Arizona Supreme Court failed to narrow a facially vague aggravating factor, and failed to properly reweigh all

aggravating and mitigating factors after striking one of the aggravating factors.

The Ninth Circuit panel then held that the Arizona Supreme Court required a causal nexus between the mitigating evidence and the crime before giving the mitigation adequate consideration. The panel concluded that the state court failed to consider Styers' mitigation evidence of post-traumatic stress disorder in violation of *Smith v. Texas*, 543 U.S. 37 (2004), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). *Styers v. Schriro*, 547 F.3d 1026, 1035 (9th Cir. 2008). The State subsequently filed a petition for rehearing en banc, which was denied.

SUMMARY OF ARGUMENT

1. The Ninth Circuit failed to give appropriate AEDPA deference to the Arizona Supreme Court's finding that it had considered all of Styers' proffered mitigation evidence. Under the AEDPA, federal courts are prohibited from granting habeas relief unless a state court's adjudication of a claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The AEDPA also requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with "clear and convincing evidence." Despite the state court's explicit statement that it had considered all of the mitigation evidence, the Ninth Circuit held that the state court failed to do so because the state court "appeared" to apply an unconstitutional

bar to the consideration of Styers' mitigation evidence. There is no clearly established Supreme Court authority that precludes a state court from finding, after considering proffered mitigation evidence, that the proffered evidence is not mitigating. The state court considered Styers' proffered evidence as required by *Eddings v. Oklahoma*. The Ninth Circuit's decision is also improper under the AEDPA because it fails to give any deference to the Arizona Supreme Court's findings or to overcome the presumption that the state court knows and follows the law.

2. The Ninth Circuit's interpretation of the Arizona Supreme Court's opinion in this case directly conflicts with the Arizona Supreme Court's capital sentencing jurisprudence and with this Court's clearly established principle that the sentencer, after considering mitigation evidence, is not required to ascribe a certain weight to that mitigation evidence. Despite the state court's explicit statement that it had *considered* all proffered mitigating evidence, the Ninth Circuit found that the state court had not done so, and erroneously mischaracterized the state court's opinion as requiring a nexus test before considering mitigation evidence in violation of *Smith v. Texas*. Arizona has never required a "causal nexus" test before the sentencer considers mitigation evidence. To the contrary, the state court has always followed the rule announced in *Eddings v. Oklahoma*, and *considers* proffered relevant mitigation. Arizona's assessment of the nexus between the mitigation evidence and a defendant's conduct applies to the weight the evidence is given—not to whether the evidence is *considered*. Given the broad applicability of the Ninth Circuit's decision and its clear conflict with

Arizona law as set forth by the Arizona Supreme Court, review by this court is imperative.

REASONS WHY THE WRIT SHOULD BE GRANTED

I

THE NINTH CIRCUIT FAILED TO GIVE PROPER AEDPA DEFERENCE TO THE ARIZONA SUPREME COURT'S FINDING THAT IT HAD CONSIDERED ALL PROFFERED MITIGATION IN ITS INDEPENDENT REWEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES.

Because Styers filed his petition for writ of habeas corpus after April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") applies. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997). The Ninth Circuit's ruling violates the basic tents of the AEDPA by finding that the state court failed to do something (consider mitigation evidence) that the state court expressly stated it had done. The Ninth Circuit's ruling ignores basic principles of comity and should be reversed by the Court.

Under the AEDPA, federal courts may grant habeas relief from a state conviction only if it is contrary to, or an unreasonable application of, clearly established law as determined by the United States Supreme Court, or it was based on an unreasonable determination of the facts in light of the evidence presented in the state courts. *See Mitchell v. Esparza*,

540 U.S. 12, 15 (2003).

The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under the law." *Bell v. Cone,* 535 U.S. 685, 693 (2002) (citing *Williams v. Taylor*, 529 U.S. 362, 403–04 (2000)). The AEDPA was specifically enacted "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and to further the principles of comity, finality, and federalism." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (citations omitted); *Greenawalt v. Stewart*, 105 F.3d 1268, 1275 (9th Cir. 1997) ("Congress intended to restrict the availability of habeas corpus relief when it passed the Act."). Under the AEDPA, a state prisoner is not entitled to federal habeas relief with respect to any federal claim that was adjudicated on the merits in state court proceedings unless adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). This amended statute creates a "highly deferential standard for evaluating state court rulings." *Lindh*, 521 U.S. at 334, n.7 (1997). Thus, review of the state court's decision is not "*de novo*." *Van Tran v. Lindsey*, 212 F.3d 1143, 1149 (9th Cir. 2000) (*overruled in part on other grounds*, *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003)).

In evaluating the state court decision, the federal courts must refrain from mischaracterization of the state court opinion or record, and must defer to the presumption that state courts know and follow the law. *See, e.g., Bell*, 543 U.S. at 455 ("We do not think that a federal court can presume so lightly that a state court failed to apply its own law. As we have said before, § 2254(d) dictates a 'highly deferential standard for evaluating state-court rulings,' which demands that state-court decisions be given the benefit of the doubt. . . . Federal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation.") (citations omitted)

Despite the Arizona Supreme Court's explicit statement that it had considered the proffered mitigation in this matter, the Ninth Circuit found that the state court failed to consider and give effect to the mitigation evidence that Styers presented. (Pet. App. A, at 20.) However, after invalidating an aggravating circumstance for insufficient evidence, the Arizona Supreme Court considered the proffered mitigation evidence, including Styers' alleged post-traumatic stress disorder from his combat service. Specifically,

the state court stated:

> Because the trial court did not list each of the proffered items of claimed mitigation and state that it found them unavailing does not mean that the trial court did not consider them. It is apparent that the trial court considered this evidence, but ultimately found that it was not sufficiently substantial to call for leniency. *We will also consider it in our independent review.*
>
> . . .
>
> We have *considered* all of the proffered mitigation and, like the trial court, find it is not sufficiently substantial to warrant leniency.

177 Ariz. at 117, 865 P.2d at 778.

The Ninth Circuit failed to give deference to the Arizona Supreme Court's determination that it had considered all of Styers' proffered mitigation. Under the AEDPA, federal courts are required to presume a state court's factual determinations are correct. 28 U.S.C. § 2254(e)(1). The Ninth Circuit ignored this mandatory standard of review and mischaracterized the Arizona Supreme Court's opinion.

The Ninth Circuit found instead that, because the Arizona Supreme Court did not find Styers' PTSD to be mitigating, it unconstitutionally barred the

evidence from being considered. This is a tortured reading of the state court's opinion. The Arizona Supreme Court clearly stated that it considered *all* of Styers' proffered mitigation.

Moreover, the Ninth Circuit failed to defer to AEDPA's presumption that the state court knows and follows the law. *Bell*, 543 U.S. at 455. This Court has held that there is a presumption that courts are deemed to have considered all mitigating evidence where the court so states. *Parker v. Dugger*, 498 U.S. 308, 314 (1991). This Court should summarily reject the Ninth Circuit's ruling that the Arizona Supreme Court did not consider Styers' proffered mitigation.

II

THE NINTH CIRCUIT'S ANALYSIS MISAPPLIES *SMITH v. TEXAS*, AND DIRECTLY CONFLICTS WITH ARIZONA'S CAPITAL SENTENCING JURISPRUDENCE.

The failure to presume that the Arizona Supreme Court knew and followed the law notwithstanding, the Ninth Circuit's decision is contrary to this Court's clearly established jurisprudence that mitigation evidence is not entitled to any particular mitigating weight. *Harris v. Alabama*, 513 U.S. 504, 512 (1995). The Ninth Circuit's decision effectively requires the state court to find, after considering proffered mitigation evidence, that the proffered evidence is mitigating. There is no clearly established Supreme Court authority that

precludes a state court from finding, after considering proffered mitigation evidence, that the proffered evidence is not mitigating.

After considering Styers' proffered PTSD mitigation evidence, the Arizona Supreme Court found it was of no mitigating weight because Styers' experts found that his condition had no relevance to his murderous act. Styers planned the murder—Styers tricked the victim into believing he was going to see Santa Claus, took him into the desert and shot the victim in the back of the head. There was no evidence that the murder was the result of any combat flashbacks or combat stress. The state court simply found that this evidence was not relevant to the murder.

This Court has established that a capital sentencing process that excludes from consideration circumstances of the particular offense or the relevant facets of the character and record of the individual offender violates the Eighth Amendment. *Eddings*, 455 U.S. at 113–14, *Lockett v. Ohio*, 438 U.S. 586, 605–06 (1978). The Eighth Amendment requires that the sentencer have the ability to consider and give effect to mitigation evidence. *Smith,* 543 U.S.at 47. The Arizona Supreme Court, in its reweighing of the mitigation evidence in this case, considered and gave effect to Styers' mitigation evidence. The state court's decision is neither contrary to this Court's clearly established authority, nor an unreasonable application of the law.

The Ninth Circuit's decision is based on a flawed

interpretation of *Smith*, 543 U.S. at 37, and *Eddings*, 455 U.S. at 104, to this case. According to the Ninth Circuit, those cases hold that a sentencer must give substantial weight to *any* mitigating evidence proffered by a capital defendant:

> In conducting its independent review of the propriety of Styers' death sentence, the Arizona Supreme Court stated that it had "considered all of the proffered mitigation," *see Styers*, 177 Ariz. at 117, 865 P.2d at 778. However, its analysis prior to this statement indicates otherwise.
>
> With regards to the evidence that Styers suffered from post-traumatic stress disorder as a result of his combat service in Vietnam, the court stated the following:
>
> > This could also, in an appropriate case, constitute mitigation. *See State v. Bilke*, 162 Ariz. 51, 53, 781 P.2d 28, 30 (1989) . . . *However*, two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the conspiracy and the murder.
> >
> > *Styers*, 177 Ariz. at 116, 865 P.2d at 177. (Italics added.)

> The court's use of the conjunctive adverb "however," following its acknowledgment that such evidence "could" in certain cases constitute mitigation, indicates that this was not such a case.
>
> . . .
>
> In applying this type of nexus test to conclude that Styers' post traumatic stress disorder did not qualify as mitigating evidence, the Arizona Supreme Court appears to have imposed a test directly contrary to the constitutional requirement that all relevant mitigating evidence be considered by the sentencing body.

(Pet. App. A, at 18–20) (citing *Smith v. Texas*, 543 U.S. at 45.)

The Ninth Circuit's opinion misinterprets both the Arizona Supreme Court's opinion and the relevant case law. The court of appeals has mischaracterized the Arizona Supreme Court's legal conclusion and analysis. The Arizona Supreme Court did not decline to *consider* Styers' proffered mitigation regarding his diagnosis of post-traumatic stress disorder. Instead, the state court determined that the proffered mitigating evidence of post-traumatic stress disorder had no substantial mitigating weight.

The Arizona Supreme Court's "causal nexus"

test is simply an application of common sense. If, for example, a defendant asserts as mitigating evidence that he is a white male, or that he was born on a Monday, the sentencer is not required to give any particular weight to those facts, particularly when a defendant does not explain how those factors had some bearing on his adult conduct.

The Ninth Circuit's reliance on *Smith* is unavailing. In *Smith*, this Court found unconstitutional a sentencing scheme that negated jurors' ability to consider and give effect to mitigation evidence if the evidence did not directly relate to two statutorily specified issues. 543 U.S. at 47. In that case, before the jury reached its sentencing decision, the trial judge gave a supplemental instruction directing the jury to give effect to mitigation evidence, but allowed the jury to do so only in the context of negating what would otherwise be affirmative responses to the special issues instruction relating to deliberateness and future dangerousness. *Id.* at 38.

This Court, relying on its holding in *Tennard v. Dretke*, 542 U.S. 274 (2004), reiterated that "the jury must be given an effective vehicle with which to weigh mitigating evidence so long as the defendant has met a 'low threshold of relevance,' which is satisfied by 'evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" 542 U.S. at 284–85 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990)). This Court found that the supplemental jury instruction given in *Smith* was similar to the one found unconstitutional in *Penry v.*

Johnson (Penry II), 532 U.S. 782 (2001). There this Court held:

> We generally presume that jurors follow their instructions. Here, however, it would have been both logically and ethically impossible for a juror to follow both sets of instructions. Because Penry's mitigating evidence did not fit within the scope of the special issues in the manner prescribed on the verdict form necessarily meant ignoring the command of the supplemental instruction.
>
> . . .
>
> The supplemental instruction therefore provided an inadequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence.

Id. at 799–800.

Thus, *Smith* and *Tennard* stand only for the proposition that a sentencer cannot be precluded from *considering* proffered mitigation evidence. *Smith* and *Tennard* do not support an assertion that the sentencer cannot determine the weight to be afforded proffered mitigation based on its causal nexus to the crime. In its independent review of Styers' death sentence, the Arizona Supreme Court did not unreasonably apply Supreme Court precedent. Unlike in *Smith*, there were no jury instructions barring the consideration of Styers' proffered mitigation, and in fact the evidence was considered by a sentencer (a state trial judge) who

is presumed to know and follow the law. Styers was not barred from presenting mitigation evidence and the state court considered all of his proffered mitigation evidence.

In considering Styers' mitigating evidence of PTSD, the Arizona Supreme Court found that it was not particularly relevant in this case. By stating that Styers' evidence of post-traumatic stress disorder could have been mitigating in another type of case, the Arizona Supreme Court was not saying it did not consider the evidence—the state court was opining that the evidence did not have any particular mitigating weight in Styers' case. This was not a case where Styers' alleged PTSD condition had any connection to the murder of the 4-year-old victim. Styers planned the murder—Styers tricked the victim into believing he was going to see Santa Claus, and took him into the desert and shot the victim in the back of the head. There was no evidence that the murder was the result of any combat flashbacks or combat stress. Styers' condition was not relevant to his murderous act.

Thirty years ago, this Court held that "[t]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Lockett*, 438 U.S. at 608. The Court later held that a capital sentencer must be allowed to consider all relevant mitigating evidence:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter*

> *of law*, any relevant mitigating evidence. . . The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings, 455 U.S. at 114 (emphasis in original). *See also McKoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring in judgment) ("*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all.").

The Eighth Amendment thus requires only that a sentencer be able to consider and give effect to mitigating evidence proffered by a capital defendant. This Constitutional provision is satisfied unless evidence is "placed beyond the effective reach of the sentencer" and the sentencer is precluded from considering the proffered mitigation in the first instance. *Graham v. Collins*, 506 U.S. 461, 474 (1993); *see also Kansas v. Marsh*, 548 U.S. 163, 175 (2006) ("In aggregate, [this Court's] precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to *consider* that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here."). (Emphasis added.)

In the instant case, the Arizona Supreme Court explicitly stated that, like the trial court, it considered all of the proffered mitigation evidence. *Styers*, 177 Ariz. at 117, 865 P.2d at 778. There is nothing in the state court's opinion indicating that it failed to consider mitigating evidence or that it barred any mitigating evidence from consideration. While the Arizona Supreme Court relied on the absence of a causal nexus between Styers' alleged PTSD and his subsequent crime in ascribing no significant mitigating weight to the proffered mitigation, there can be no doubt that the court considered the mitigation in its independent review:

> It is apparent that the trial court considered this evidence, but ultimately found that it was not sufficiently substantial to call for leniency. We will also consider it in our independent review.
>
> . . .
>
> We have considered all of the proffered mitigation, and like the trial court, find it is not sufficiently substantial to warrant leniency.

Id.

The Arizona Supreme Court has made clear, both prior to and after the *Tennard* and *Smith* decisions, that the sentencer in a capital case cannot be prohibited from *considering* any proffered mitigation, but that the absence of a causal nexus to the crime may be considered in assessing the weight or significance to be afforded the proffered evidence. In *State v. Hoskins*,

199 Ariz. 127, 152, ¶ 113, 14 P.3d 997, 1022 (2000), the court stated:

> The "nexus" or "causal link" requirement in these cases has purpose. Where we determine questions of aggravation and mitigation in the sentencing process, the significant point in time for causation is the moment at which the criminal acts are committed. If the defendant's personality disorder or dysfunctional family background leads reasonable experts to conclude that the disorder in fact caused the crime, significant mitigation is established. But here, the evidence runs counter to that very proposition. The murder was not consistent with the proffered symptoms of personality disorder or family background because it was not an impulsive act, nor was it based on lapse of judgment.

See also State v. Pandeli, 215 Ariz. 514, 532, ¶ 72, 161 P.3d 557, 575 (2007) ("Although '[w]e do not require that a nexus between the mitigating factors and the crime be established before we consider the mitigation evidence . . . the failure to establish such a causal connection may be considered in assessing the quality and strength of the mitigation evidence.'"); *see also State v. Sansing*, 206 Ariz. 232, 239, ¶¶ 26–28, 77 P.3d 30, 37 (2003) (absent expert testimony linking cocaine use to defendant's capacity to control his conduct or his capacity to appreciate the wrongfulness of his actions at the time of the murder, defendant did not establish

statutory mitigating circumstance or weighty non-statutory mitigation); *State v. Harrod*, 200 Ariz. 309, 320, ¶ 54, 26 P.3d 492, 502 (2001) ("The [sentencing] court found that the absence of Harrod's biological father was not a mitigating factor because there was no evidence that his absence had any causal relationship to Harrod's participation in the murder. We agree.").

The Ninth Circuit's reading of *Tennard* and *Smith* is not only incorrect, but it is directly contrary to United States Supreme Court precedent. "The Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer." *Harris*, 513 U.S. at 512. "As long as evidence of mitigation [i]s not excluded from consideration at the sentencing proceeding," the principles of *Lockett,* 438 U.S. at 586 and *Eddings*, 455 U.S. at 104 are not violated. *Barclay v. Florida*, 463 U.S. 939, 961, n.2 (1983) (Stevens, J., concurring).

Thus, in direct contradiction to Supreme Court precedent, the Ninth Circuit wrongly set forth a rule that would require a capital sentencer to give specific mitigating weight to mitigation evidence proffered by a capital defendant, regardless of its quality or relationship to the murder. The Ninth Circuit's new rule has no basis in *Tennard* or *Smith*, and is contrary to *Harris*.

The Ninth Circuit's *Smith* analysis directly conflicts with that of the Arizona Supreme Court. Left unchanged, that analysis will affect every Arizona case in which courts or jurors have considered, but given

diminished weight to, proffered mitigation for which a causal nexus has not been established. Moreover, left unchanged, the Ninth Circuit's interpretation will become the benchmark by which federal courts must determine whether a state court decision involved an unreasonable application or *Smith* or *Tennard*. *See* 18 U.S.C. § 2254(d)(1). Given the broad applicability of the Ninth Circuit's decision and its clear conflict with Arizona law as set forth by the Arizona Supreme Court, review by this court is imperative.

Finally, if this Court believes that the Arizona Supreme Court did not even "consider" the evidence of Styers' post-traumatic stress disorder, the State requests that this Court ask for clarification from the Arizona Supreme Court. This Court could do so by certifying the following question to the Arizona Supreme Court:

> Does the causal nexus analysis utilized by the Arizona Supreme Court in addressing mitigation evidence preclude consideration of evidence for which there is no causal nexus, or does the analysis simply provide a mechanism for assessing how much weight, if any, should be accorded the proffered evidence?

CONCLUSION

For these reasons, the Petitioners respectfully request that this Court grant their petition for writ of certiorari.

Respectfully submitted

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

James Lynn Styers, *Petitioner-Appellant,* v. Dora B. Schriro, Arizona Department of Corrections, *Respondent-Appellee.*	No. 07-99003 D.C. No. CV-98-02244-PHX EHC OPINION

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted
August 20, 2008—Pasadena, California

Filed October 23, 2008

Before: Alex Kozinski, Chief Judge, Jerome Farris and Carlos T. Bea, Circuit Judges.

Per Curiam Opinion

COUNSEL

Cary Sandman of Waterfall Economidis, Caldwell, Hanshaw & Villamana, Tucson, Arizona, and Amy Beth Krauss, Tucson, Arizona, for the petitioner-appellant.

Terry Goddard, Attorney General, and Jeffrey A. Zick, Kent Cattani and J.D. Nielsen, Assistant Attorney General of the State of Arizona, Phoenix, Arizona, for the respondent-appellee.

OPINION

PER CURIAM:

James Lynn Styers, an Arizona state prisoner, appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition, challenging his conviction and death sentence for conspiracy, first degree murder, and kidnaping. We affirm the district court on all counts, except Styers' claim that the Arizona Supreme Court failed to fulfill its obligations under *Clemons v. Mississippi*, 494 U.S. 738 (1990).

FACTUAL AND PROCEDURAL BACKGROUND

In early December 1989, Styers shot and killed the four-year-old son of Debra Milke, the woman with

whom he and his daughter shared an apartment.[1] A jury subsequently convicted him of first degree murder, conspiracy to commit first degree murder, child abuse and kidnaping. With respect to the murder count, the trial court found three statutory aggravating factors and no mitigating factors sufficiently substantial to call for leniency, and imposed the death penalty.

After exhausting his direct appeals[2] and state collateral review, Styers petitioned for a writ of habeas corpus in federal court, raising a number of constitutional claims regarding his trial and sentencing proceedings. The district court denied his petition, but granted a certificate of appealability as to Styers' claim that he received ineffective assistance of counsel. We expanded the certificate of appealability to include also Styers' claims that the Arizona Supreme Court failed adequately to narrow a facially vague aggravating factor applied in his case, and failed to fulfill its constitutional obligation, under *Clemons*, to reweigh all aggravating and mitigating factors after striking one of the aggravating factors.

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[1] For a more detailed discussion of the facts, see the Arizona Supreme Court's opinion in Styers' direct appeal, *State v. Styers*, 177 Ariz. 104, 865 P.2d 765 (1993).

[2] The child abuse conviction and sentence were vacated on direct appeal. *See Styers*, 177 Ariz. at 117, 865 P.2d at 778. The remaining convictions were affirmed. *Ibid.*

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction over Styers' habeas petition under 28 U.S.C. § 2254. We have jurisdiction under 28 U.S.C. § 1291.

Styers filed his § 2254 petition after the effective date of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). Habeas relief is therefore available only if the state court ruling "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

DISCUSSION

I. Ineffective Assistance of Counsel

Styers contends that he received ineffective assistance of trial counsel based on counsel's failure to move to strike the jury panel on the grounds of prejudicial pre-trial publicity.[3]

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[3] Although the district court certified additional allegations of ineffective assistance of counsel, Styers does not raise these allegations in his opening brief. We deem them waived. *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990); *United States v. King*, 257 F.3d 1013, 1029 n.5 (9th Cir. 2001).

A. Pre-Trial Publicity

The body of Christopher Milke was found by police in the evening of Sunday, December 3, 1989. The following day, the Arizona Republic, a Phoenix area newspaper, reported on its front page that Milke, Styers, and Roger Scott were arrested and charged with first degree murder. The paper further reported that Milke was not present when the boy was killed, but conspired with "the other suspects to have her son killed." The following day, another article appeared on the front page of the paper speculating as to the possible motives for the killing, including life insurance proceeds and possible abuse. However, the article also reported that the medical examiner who performed the autopsy found no indication of either physical or sexual abuse. The article ultimately indicated that the chief motive appeared to be that Milke and Styers felt the boy was too much trouble, but noted that Styers' three-year-old daughter, who also lived at the apartment, was not harmed. By the third day, the newspaper reported the substance of Scott's statement to police, which included his assertion that he was to receive $250 from Styers for his help and that he drove Styers and Christopher to the general vicinity of the crime scene, after which Styers walked Christopher to a nearby wash[4] and shot him three times. Subsequent articles also reported on the funeral proceedings and reactions by community members to the killing. One article printed several written statements of fourth

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[4] A "wash," also called an "arroyo," is a "dry channel lying in a semiarid or desert area and subject to flash flooding during seasonal or irregular rainstorms." 1 New Encyclopedia Britannica 590 (15th ed.1998).

grade school children; while most focused on their sorrow for Christopher, several children also stated that death was the appropriate punishment for the killers. A total of twenty-five articles about the crime were published in the month of December.

However, in the next seven months (January 1st 1990 through September 10, 1990), only five more articles regarding the crime were published.

Debra Milke was the first of the three defendants to proceed to trial; her trial began on September 11, 1990. Over the next month, twenty-six articles on Milke's trial were published. While the majority of these articles focus on the contents of Milke's confession, a few contain references to Styers as the alleged triggerman and someone who plotted the murder with Milke. The jury returned a guilty verdict in Milke's case on Friday, October 12, 1990.

Jury selection for Styers' trial began three days later on October 15, 1990.

B. Voir Dire Proceedings

The voir dire was conducted entirely by the trial judge. The first group of prospective jurors called for questioning consisted of a venire of thirty-six. After notifying the panel of the charges against Styers, the trial judge asked if anyone had "seen, heard, or read anything about the case." The trial judge observed that "[v]irtually everybody" raised his or her hand. The trial judge then asked whether any of the prospective jurors had formed any opinion as to the

"guilt or innocence" of the defendant. Those who raised their hands in response to this question were then questioned individually, and asked whether they would be able to set aside their opinion. Any juror who indicated in the negative was struck by the trial judge. As jurors were excused, new prospective jurors were rotated into the mix from a separate pool consisting of forty-four. Of these, thirty-nine stated that they had heard of the case, and eighteen admitted to having formed opinions they could not set aside. All eighteen were excused.

Of the final twelve jurors who rendered the verdict, six came from the group of thirty-six who had "virtually" all heard of the case, while the other six came from the group of forty-four. Of these latter six, only one had not heard of the case. However, none of the twelve jurors stated that he or she had formed an opinion about this case – either qualified or unqualified.

C. Ineffective Assistance of Counsel

[1] To establish ineffective assistance of counsel, Styers must show that defense counsel's performance was objectively deficient and resulted in prejudice. *See Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984)). Thus, Styers must not only demonstrate that defense counsel's failure to move to strike the jury panel was out of "the wide range of professionally competent assistance," *see Strickland*, 466 U.S. at 690, but also that, had counsel so moved, there is reasonable probability that the motion would

have been granted.[5] *Id.* at 695; *Kimmelman v. Morrison*, 477 U.S. 365, 383-91 (1986). As such, "[t]he governing legal standard plays a critical role in defining the question to be asked in assessing prejudice for counsel's errors." *Strickland*, 466 U.S. at 695.

[2] In reviewing challenges to jury panels based on pre-trial publicity, the Arizona courts apply the same criteria as that employed by the United States Supreme Court. Thus, a defendant challenging a jury panel exposed to pre-trial publicity must show that the publicity likely resulted in the denial of a trial by fair and impartial jurors. *See State v. Greenawalt*, 128 Ariz. 150, 163, 624 P.2d 828, 841 (1981) ("our inquiry is whether the publicity, extensive or otherwise, was prejudicial to the point of having the probable effect of precluding a trial by fair and impartial jurors"); *Dobbert v. Florida*, 432 U.S. 282, 302-03 (1977) (examining the impact of press coverage on juror's impartiality); *Murphy v. Florida*, 421 U.S. 794, 799-801 (1975) (same).

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[5] Generally, a defendant claiming ineffective assistance of counsel for failure to file a particular motion must not only demonstrate a likelihood of prevailing on the motion, but also a reasonable probability that the granting of the motion would have resulted in a more favorable outcome in the entire case. *See, e.g., Kimmelman*, 477 U.S. at 390-91 (explaining that to establish prejudice, a defendant must show not only that counsel would have prevailed on a suppression motion, but also a reasonable probability that exclusion of the evidence would have resulted in acquittal). However, because the motion in this case directly implicates the impartiality of the jury itself (as explained *infra*) no such additional or separate showing of prejudice would appear necessary. *See Dyer v. Calderon*, 151 F.3d 970, 973, n.2 (9th Cir. 1998) (conviction obtained via jury containing even one biased member requires automatic reversal); *see also Sullivan v. Louisiana*, 508 U.S. 275, 281-282 (1993) (deprivation of right to jury constitutes structural error).

In establishing his claim, a defendant may not merely rely on the fact that the prospective jurors were exposed to pre-trial publicity, but must also establish that "the jurors [had] formed preconceived notions concerning the defendant's guilt *and* that they [could] not lay those notions aside." *State v. Walton*, 159 Ariz. 571, 580, 769 P.2d 1017, 1026 (1989) (italics added) (citation omitted); *State v. Jones*, 197 Ariz. 290, 307, 4 P.3d 345, 362 (2000) ("[W]e are concerned with the prejudicial *effect* of pretrial publicity, rather than merely the *amount* of publicity.") (italics in original).

[3] Finally, the Arizona courts fully recognize that, if "a defendant can show pretrial publicity so outrageous that it promises to turn the trial into a mockery of justice or a mere formality, prejudice will be presumed without examining the publicity's actual influence on the jury." *State v. Bible*, 175 Ariz. 549, 563, 858 P.2d 1152, 1166 (1993) (citing *Rideau v. Louisiana*, 373 U.S. 723 (1963)); *see also Greenawalt*, 128 Ariz. 162-63, 624 P.2d 840-841 (citing *Sheppard v. Maxwell*, 384 U.S. 333 (1966)); *Nebraska v. Press Ass'n v. Stewart*, 427 U.S. 539, 554 (1976) (commenting that courts rarely presume prejudice due to outrageous pre-trial publicity).

D. Analysis

Styers acknowledges that he is not basing his ineffective assistance of counsel claim on a theory of actual prejudice – presumably because the voir dire transcript reveals no prejudice on the part of the seated jurors and he submitted no affidavits to the

contrary to the post-conviction court. Instead, Styers argues that the pre-trial publicity was so pervasive and inflammatory that it created a presumption of prejudice and thus trial counsel would have prevailed on a motion to strike the entire venire. The argument fails on this record.

[4] In *Murphy v. Florida*, 421 U.S. 794, 798-800 (1975), the Supreme Court summarized the rare cases in which it had previously found presumptive prejudice based on pre-trial publicity. After so doing, the Court explained that these cases "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions *or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process.*" *Id.* at 799 (italics added). Since *Murphy*, the Supreme Court has twice rejected presumptive prejudice claims based on pre-trial publicity in cases involving far more inflammatory publicity than that in Styers' case.

For example, in *Patton v. Yount*, 467 U.S. 1025 (1984), the media revealed the defendant's "prior conviction for murder, his confession, and his prior plea of temporary insanity." *Id.* at 1029. Despite the fact that 77% of the venire questioned admitted they would "carry an opinion into the jury box," and 8 out of 14 jurors and alternates seated admitted that they at some time had formed an opinion as to defendant's guilt, *id.* at 1029-30, the Court concluded that "the voir dire testimony and the record of publicity do not reveal the kind of 'wave of public passion' that would have made a fair trial unlikely by the jury that was empaneled as a whole." *Id.* at 1040. It set aside the

Third Circuit's finding of "presumed prejudice." *Id.* at 1031-32, 1040.

In *Mu'Min v. Virginia*, 500 U.S. 415 (1991), the Court reviewed a claim in which the petitioner contended that his right to an impartial jury was violated because the trial judge refused to question prospective jurors about the specific contents of the news reports to which they had been exposed. *Id.* at 417, 431. The defendant had submitted 47 articles to the trial court relating to the murder. *Id.* at 418. One or more of these articles discussed details of the murder and investigation, included information about defendant's prior criminal record, information regarding his prior murder conviction, and an indication that he had confessed to the instant killing. *Ibid.* Of the twelve jurors who rendered the final verdict, eight had heard of the case. *Id.* at 421. However, none of them stated he had formed an opinion and all swore that they could enter the jury box with an open mind. *Ibid.* In rejecting petitioner's claim that further inquiry of the jurors was constitutionally required, the Court noted that this was not the type of case where a "presumption of prejudice" was created by the pre-trial publicity and recognized that its holding may have been different had that been the case. *Id.* at 429-30.

[5] In light of *Patton* and *Mu'Min*, Styers cannot demonstrate that his trial attorney would have likely prevailed on a request to strike the jury panel. Unlike in *Mu'Min* and *Patton*, there were no prior articles indicating that defendant had confessed to the crime, nor was there any mention of prior criminal history on

his part. *Mu'Min*, 500 U.S. at 418; *Patton*, 467 U.S. at 1029. And while Styers points to statements made by his accomplice Scott which were reported in the newspaper but not admitted at his trial, these statements were substantially similar to evidence which was ultimately admitted and far less damaging than the inadmissible evidence published in *Patton*. *See Patton*, 467 U.S. at 1029 (trial upheld as fundamentally fair, despite the fact that "publicity revealed [defendant's] prior conviction for murder, his confession, and his prior plea of temporary insanity – information *not admitted into evidence at trial*.") (italics added). Finally, the articles published during Milke's trial – and thus closer in time to Styers' trial – were virtually all factual accounts of her trial proceedings, rather than opinion pieces containing inflammatory rhetoric. *See Murphy*, 421 U.S. at 801 n.4 (noting important distinction between "largely factual publicity" and "that which is invidious or inflammatory").

Appearing to recognize that the Supreme Court opinions are not in his favor,[6] Styers relies almost

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[6] As explained earlier, in reviewing jury challenges due to pre-trial publicity, the Arizona state courts typically apply the Supreme court precedent in this area. Thus, Styers would fare no better under state law. *See, e.g., State v. Bible*, 175 Ariz. 549, 563-66, 858 P.2d 1152, 1166-69 (1993) (citing Supreme Court precedent prior to rejecting presumptive prejudice claim involving 130 news articles, some of which incorrectly labeled defendant as a child molester and mentioned that he failed a lie detector test); *State v. Jones*, 197 Ariz. 290, 307, 4 P.3d 345, 362 (2000) (citing Supreme Court precedent for proposition that courts rarely presume prejudice based on pre-trial publicity and ultimately rejecting claim in trial preceded by 850 articles in print or television and removal of 30 potential jurors for fixed opinion). (Continued)

exclusively on our decision in *Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005), in which we held that the denial of a change of venue motion violated due process. However, *Daniels* was issued almost fifteen years after Styers' voir dire proceedings and decided under pre-AEDPA standards. *Daniels*, 428 F.3d at 1196, 1211-1212. As such, Styers cannot rest his ineffective assistance of counsel claim on *Daniels*.[7] *See Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994) (holding that an attorney is not ineffective for failing to anticipate a decision in a later case); *State v. Gates*, 118 Ariz. 357, 359, 576 P.2d 1357, 1359 (1978) (state courts are not bound by lower federal court precedent).

Finally, Styers argues that the state court's finding of a fair and impartial jury should not be accorded a presumption of correctness under 28 U.S.C. § 2254(e)(1) because the voir dire proceedings were far too brief and cursory to support such a finding. However, even if Styers is correct on this point,[8] his

(Continued).

[7] Daniels is distinguishable in any event, as the publicity therein was far more inflammatory. Daniels was convicted for shooting and killing two officers who had previously shot him while he was fleeing from a bank robbery, rendering Daniels a paraplegic. *Daniels*, 428 F.3d at 1186. Prior to Daniels' trial, a nine foot statue commemorating fallen police officers was erected and publicly unveiled across from the courthouse where his trial took place, numerous published letters called for his execution, and facts regarding his past criminal history – including an arrest for shooting at a police officer – were published by the press. *Id.* at 1211-12.

[8] In *Patton*, the Supreme Court held that the question of whether an individual juror could be fair and impartial was "plainly one of historical fact: did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestations of (Continued)

subsequent failure to carry his burden of persuasion in the post-conviction court – through either a showing of actual or presumed prejudice – precludes relief. *See Bible*, 175 Ariz. at 564, 858 P.2d at 1167 ("The burden to show that pretrial publicity is presumptively prejudicial clearly rests with the defendant and is 'extremely heavy.'") (citation omitted); *cf. Daniels*, 428 F.3d at 1211 (defendant conceded that "record contains no findings that any jurors demonstrated partiality or prejudice that could not be laid aside").

[6] The post-conviction state court's determination that Styers "failed to establish . . . . both prongs of ineffective assistance of counsel" cannot be deemed unreasonable under the AEDPA. *See Edwards v. Lamarque*, 475 F.3d at 1125-26.

II. Application of A.R.S. § 13-703(F)(6)

[7] Styers argues that in applying Arizona's "especially heinous or depraved" aggravating factor, under subsection (F)(6), the state courts failed to apply a constitutionally sufficient narrowing construction. However, the United States Supreme Court has squarely rejected this claim. *See Lewis v. Jeffers*, 497 U.S. 764, 777 (1990) (stating that *Walton v. Arizona*, 497 U.S. 639 (1990), "disposes of respondent's claim that Arizona has not construed its subsection (F)(6)

(Continued).

impartiality have been believed," 467 U.S. at 1036, 1038, noting that "the determination is essentially one of credibility, and therefore largely one of demeanor." However, the Court left open the question of whether a presumption of correctness should be applied to a trial court's finding that a "jury as a whole is impartial." *Id.* at 1032, n.7.

aggravating circumstance in a constitutionally narrow manner). Thus, so long as the Arizona State Supreme Court applied its narrowing construction to the facts of Styers' case, all that remains for our review is whether the "state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." *Jeffers*, 497 U.S. at 780. In this regard, "[a] state court's finding of an aggravating circumstance in a particular case – including a de novo finding by an appellate court that a particular offense is 'especially heinous . . . or depraved' – is arbitrary or capricious if and only if no reasonable sentencer could have so concluded." *Id.* at 783. This requires the application of the *Jackson v. Virginia*, 443 U.S. 307 (1979), standard. *Id.*

Here, when the Arizona Supreme Court rejected Styers' (F)(6) challenge, it applied the narrowing construction contained within *State v. Gretzler*, wherein it had identified five circumstances that support a finding of heinousness and depravity.[9] 135 Ariz. 42, 52, 659 P.2d 1, 11 (1983). The court then found that the senselessness of the murder and the helplessness of the four-year old victim, as well as Styers' special relationship to the child as his full-time caregiver, supported the finding that this murder was especially heinous and depraved. *See Styers*, 177 Ariz. at 115; 865 P.2d at 776.

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[9] In both *Walton* and *Jeffers*, the Arizona Supreme court had cited *Gretzler* in construing and applying the "especially heinous and depraved" factor. *Jeffers*, 497 U.S. at 770-71 (citing *State v. Jeffers*, 135 Ariz. 404, 430, 661 P.2d 1105, 1131 (1983)); *Walton*, 497 U.S. at 645 (citing *State v. Walton*, 159 Ariz. 571, 587, 769 P.2d 1017, 1033 (1989).

[8] The record reveals sufficient evidence to support the application of the (F)(6) finding. *See Gretzler*, 135 Ariz. at 52, 659 P.2d at 11 (noting that "either or both" the senselessness and helplessness factors may, "together with other circumstances present in a particular case," lead to the conclusion that the offense was heinous or depraved); *see also Correll*, 137 F.3d at 1420 (rejecting challenge to application of F(6) factor where trial record revealed, *inter alia*, helplessness of victims and senselessness of murders). The Arizona Supreme Court's finding that Styers committed the murder in an "especially heinous . . . or depraved manner," was neither arbitrary nor capricious. *Jeffers*, 497 U.S. at 784; *cf. Smith v. Mitchell*, 453 F.3d 1203, 1206 (9th Cir. 2006) ("AEDPA requires the federal courts to review *Jackson* claims with additional deference.").

III. *Clemons* duty to re-weigh

[9] On direct review, the Arizona Supreme Court found the aggravating factor of pecuniary gain to be invalid. Styers contends that the court then failed to properly re-weigh the aggravating and mitigating circumstances as required by *Clemons v. Mississippi*, 494 U.S. 738, 748-749 (1990). Under *Clemons*, an appellate court in a "weighing state," such as Arizona, can affirm a death sentence based on an invalid aggravating factor only after conducting either a harmless error review or reweighing the mitigating evidence against the remaining valid aggravating factors. *See Jeffers v. Lewis*, 38 F.3d 411, 414-415 (9th Cir. 1994) (en banc), citing *Clemons*, 494 U.S. at 741.

In so doing, it must consider all relevant mitigating evidence proffered by the defendant. *See Jeffers v. Lewis*, 38 F.3d at 414; *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

A. Exhaustion/Procedural default

[10] The district court dismissed the *Clemons* claim on procedural default grounds, finding first that Styers failed to exhaust it in the Arizona state courts and, second, that he would now be barred from doing so under Arizona Rule of Criminal Procedure 32.2(a)(3). However, after the Arizona Supreme Court had decided his appeal, Styers filed a motion for reconsideration pursuant to Rule 31.18 of the Arizona Rules of Criminal Procedure. *See Correll v. Stewart*, 137 F.3d 1404, 1418 (9th Cir. 1998) (noting that a motion for reconsideration is "an avenue of relief that the Arizona Rules of Criminal Procedure clearly outline"). In his motion, Styers specifically argued that the court had failed to consider relevant mitigating evidence during its independent review of the sentence, in violation of *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982), and the Eighth Amendment. Styers' *Clemons* claim is based on a violation of *Eddings*; he alleges that the Arizona Supreme Court did not satisfy its constitutional duty to reweigh the aggravating and mitigating factors because the court improperly refused to consider relevant mitigating evidence. His motion for reconsideration adequately informed the state court of the factual and legal basis for this claim. It is therefore exhausted. *Anderson v. Harless*, 459 U.S. 4, 6 (1982).

Although the district court did not resolve this claim on the merits, we nevertheless do so here, as is our prerogative. *See Granberry v. Greer*, 481 U.S. 129, 134 (1987) (Appellate courts have discretion to "determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional . . . district court proceedings before reviewing the merits . . . .").

B. Merits

In conducting its independent review of the propriety of Styers' death sentence, the Arizona Supreme Court stated that it had "considered all of the proffered mitigation," *see Styers*, 177 Ariz. at 117, 865 P.2d at 778. However, its analysis prior to this statement indicates otherwise.

With regards to the evidence that Styers suffered from post-traumatic stress disorder as a result of his combat service in Vietnam, the court stated the following:

> This could also, in an appropriate case, constitute mitigation. *See State v. Bilke*, 162 Ariz. 51, 53, 781 P.2d 28, 30 (1989) . . . *However*, two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the conspiracy and the murder.
>
> Styers, 177 Ariz. at 116, 865 P.2d at 777. (italics added.)

The court's use of the conjunctive adverb "however," following its acknowledgement that such evidence "could" in certain cases constitute mitigation, indicates that this was not such a case.[10] In *Bilke*, the case cited by the *Styers* court as an example of when post-traumatic stress disorder evidence could constitute mitigation, the defendant presented newly-discovered evidence including a psychological report which specifically tied his disorder to his criminal acts. *See Bilke*, 162 Ariz. at 52, 781 P.2d at 29. The *Bilke* court remanded the matter for an evidentiary hearing, stating, "[h]ad the sentencing judge been aware that a mental disease known as post-traumatic disorder existed . . . and that the disorder was a *causative* factor leading to the commission of the crimes, he might well have sentenced the defendant differently." *Bilke*, 162 Ariz. at 53, 781 P2d at 30 (italics added); *cf. State v. Hoskins*, 199 Ariz. 127, 152, 14 P.3d 997, 1022 (2000) (en banc) ("If the defendant fails to prove causation, *the circumstance will not be considered mitigating.*") (italics added); *State v. Vickers*, 129 Ariz. 506, 516, 633 P.2d 315, 325 (1981) (noting that evidence presented by defendant established only that character disorder existed, not that the disorder "impaired his capacity on the night [the victim] was murdered *so as to constitute a mitigating circumstance.*") (italics added.)

[11] In applying this type of nexus test to conclude that Styers' post traumatic stress disorder did not qualify as mitigating evidence, the Arizona

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[10] Dictionary definitions of "however" include "nevertheless; yet; in spite of that; all the same." Webster's New World College Dictionary (4th ed. 2006).

Supreme court appears to have imposed a test directly contrary to the constitutional requirement that all relevant mitigating evidence be considered by the sentencing body. *Smith v. Texas*, 543 U.S. 37, 45 (2004) (citing *Eddings*, and stating that nexus test is a test "we never countenanced and now have unequivocally rejected," and that this holding was "plain under [its] precedents"); *see Eddings*, 455 U.S. at 114-15 ("[t]he sentencer, and the [appellate court] on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.") As such, the court could not have fully discharged its obligations under *Clemons*. *Cf. Jeffers*, 38 F.3d at 418 (rejecting *Clemons* claim where it was "clear" that all proffered evidence in mitigation had been considered). We reverse the district court's decision denying relief with regards to this claim. In so doing, however, we neither express nor imply any opinion as to the appropriate sentence in this case. This is a matter for the state courts, so long as the constitutional obligations under *Eddings* and *Clemons* are honored.

DISPOSITION

[12] We vacate the district court's judgment denying the writ of habeas corpus and remand with instructions to grant the writ with respect to Styers' sentence unless the state, within a reasonable period of time, either corrects the constitutional error in petitioner's death sentence or vacates the sentence and imposes a lesser sentence consistent with law.

AFFIRMED in part; VACATED in part and REMANDED.

No. 07-99003

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES LYNN STYERS, Petitioner-Appellant, -vs- DORA B. SCHRIRO, et.al., Respondents-Appellees.	) ON APPEAL FROM) THE UNITED STATES) DISTRICT COURT FOR) THE DISTRICT OF) ARIZONA,) No. CIV-98-2244

RESPONDENTS-APPELLEES' MOTION FOR REHEARING AND REHEARING EN BANC

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EN BANC RULE 35 STATEMENT

The panel found that the Arizona Supreme Court, in its independent review of Styers' death sentence, failed to consider evidence that Styers suffered from post-traumatic stress disorder (PTSD) as a result of his combat service in Vietnam. Notwithstanding the Arizona Supreme Court's express statement, "We have considered all of the proffered mitigation," the panel found that the state court's finding that Styers' PTSD condition did not constitute mitigation because the condition was not connected to the crime, demonstrated that the state court did not adequately consider the proffered mitigation evidence.

Under the standard of review mandated by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a state court decision cannot be reversed on federal collateral review unless it involved an unreasonable application of clearly established Supreme Court authority. 28 U.S.C. § 2254 (d)(1). There is no clearly established Supreme Court authority that precludes a state court from finding, after *considering* proffered mitigation evidence, that the proffered evidence is not mitigating. In fact, by noting that the state court only "appears to have" imposed a test contrary to Supreme Court authority (*Styers v. Schriro*, 2008 WL 4661819, at *7), the panel has implicitly acknowledged that there is no clear Supreme Court authority to the contrary. Accordingly, the panel decision should be reversed.

The panel decision is improper under the AEDPA and fails to give deference to the Arizona Supreme Court's findings or to overcome the presumption that the state court knows and follows controlling case law

from the United States Supreme Court. Moreover, the panel decision conflicts with the following United States Supreme Court and Ninth Circuit precedent:

1. *Harris v. Alabama*, 513 U.S. 504, 512 (1995), which holds that mitigation evidence is not entitled to any particular mitigating weight.

2. *Clark v. Ricketts*, 958 F.2d 851, 859 (9th Cir. 1992), which holds that a court is usually deemed to have considered all mitigating evidence where the court so states.

Accordingly, reconsideration by the en banc court is necessary to secure and maintain uniformity of the court's decisions

STATEMENT OF THE CASE

James Lynn Styers was convicted of first-degree murder, conspiracy to commit first-degree murder, child abuse, and kidnapping. *State v. Styers*, 177 Ariz. 104, 108, 865 P.2d 765, 769 (1993). The trial court found three aggravating factors: the victim was under the age of 15, A.R.S. § 13–703(F)(9); the murder was committed in expectation of pecuniary gain, A.R.S. § 13–703(F)(5); and the murder was committed in an especially heinous and depraved manner, A.R.S. § 13–703(F)(6). After considering all proffered mitigating evidence, the trial court found the mitigation was not sufficiently substantial to call for leniency. *Styers*, 177 Ariz. at 109, 865 P.2d at 770.

On direct appeal, the Arizona Supreme Court reversed the finding of the pecuniary gain aggravating factor. The state court found that there was insufficient evidence that Styers' co-defendant, Debra Milke, agreed to pay Styers to murder her 4-year-old son. 177 Ariz. at 115, 865 P.2d at 776. The court nevertheless upheld Styers' death sentence after independently reviewing the remaining aggravating circumstances and the mitigating evidence proffered by Styers:

> The special verdict stated that none of the statutory mitigating circumstances were proven and found no nonstatutory "mitigating circumstances sufficiently substantial to call for leniency." Defendant argues that the following facts constitute mitigating evidence that warrants leniency: no prior criminal record; honorable discharge from United States Marines after serving in Vietnam; evidence that defendant suffered from post-traumatic stress syndrome; defendant cared for Christopher; and the giving of a felony murder instruction.
>
> Defendant had no prior convictions for either misdemeanors or felony offense. This is relevant mitigating evidence. *See State v. Rossi (Rossi III),* 171 Ariz. 276, 279, 830 P.2d 797, 800, *cert. denied,* 506 U.S. 1003, 113 S.Ct. 610, 121 L.Ed.2d 544 (1992). Defendant's service in Vietnam and honorable discharge are also relevant

mitigating circumstances. *See State v. Lavers,* 168 Ariz. 376, 396, 814 P.2d 333, 353, *cert. denied,* 502 U.S. 926, 112 S.Ct. 343, 116 L.Ed.2d 282 (1991). Defendant also suffered from post-traumatic stress disorder prior to and around the time of the murder as a result of his combat service in Vietnam. This could also, in an appropriate case, constitute mitigation. *See State v. Bilke,* 162 Ariz. 51, 53, 781 P.2d 28, 30 (1989) (finding evidence of post-traumatic stress disorder constituted newly discovered evidence that may have affected sentencing). However, two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the conspiracy and the murder.

There was testimony that defendant cared for Christopher at times, but his actions and participation in his murder speak volumes to that. Finally, giving a felony murder instruction "is not relevant 'where the defendant intended to kill the victim or where the defendant knew with substantial certainty that his conduct would cause death.'" *State v. Gillies,* 135 Ariz. 500, 513, 662 P.2d 1007, 1020 (1983) (quoting *State v. Zaragosa,* 135 Ariz. 63, 659 P.2d 22, *cert. denied,* 462 U.S. 1124, 103 S.Ct. 3097, 77 L.Ed.2d 1356 (1983)). The defendant conspired to kill Christopher and then he killed him. The

> fact that the court gave a felony murder instruction is not mitigating here.
>
> Because the trial court did not list each of the proffered items of claimed mitigation and state that it found them unavailing does not mean that the trial court did not consider them. It is apparent that the trial court considered this evidence, but ultimately found that it was not sufficiently substantial to call for leniency. We will also consider it in our independent review.
>
> . . .
>
> This court independently reviews aggravating and mitigating circumstances to determine whether the death penalty was properly imposed. *See Rossi*, 171 Ariz. at 278, 830 P.2d at 799. We have excluded from our consideration pecuniary gain, having found the evidence does not prove that factor beyond a reasonable doubt. We have *considered* all of the proffered mitigation and, like the trial court, find it is not sufficiently substantial to warrant leniency.

177 Ariz. at 116–17, 865 P.2d at 777–78. (Emphasis added.)

After exhausting his state post-conviction review, Styers petitioned for a writ of habeas corpus in district court, raising a number of constitutional claims regarding his trial and sentencing proceedings. The

district court denied his petition, but granted a certificate of appealability as to his claim that he received ineffective assistance of counsel. This Court expanded the certificate of appealability to include a claim that the Arizona Supreme Court failed to narrow a facially vague aggravating factor, and failed to properly reweigh all aggravating and mitigating factors after striking one of the aggravating factors.

On appeal to this Court, the panel held that the Arizona Supreme Court required a causal nexus between the mitigating evidence and the crime before giving the mitigation adequate consideration. Despite the Arizona Supreme Court's explicit statement that it had considered all of the proffered mitigation, the panel erroneously concluded that the state court failed to consider Styers' mitigation evidence of post-traumatic stress disorder in violation of *Smith v. Texas*, 543 U.S. 37 (2004), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982) .

ARGUMENTS

I

THE PANEL'S DECISION FAILS TO GIVE PROPER DEFERENCE TO THE ARIZONA SUPREME COURT'S FINDING THAT IT CONSIDERED ALL OF THE PROFFERED MITIGATION.

Despite the Arizona Supreme Court's statement to the contrary, the panel found that the state court

failed to give effect to the mitigation evidence that Styers presented. This Court should reconsider this finding because there is no United States Supreme Court authority that precludes a state court from making a finding, after having considering proffered mitigating evidence, that the evidence is not mitigating. Furthermore, the panel's decision is contrary to this Circuit's case law.

In *Clark v. Ricketts*, 958 F.2d 851, 858–59 (9th Cir. 1992), an Arizona defendant argued that because the trial court did not list all of the proffered mitigation when it imposed sentence, the state court violated its duty to consider all proffered mitigation under *Eddings*. This Court found that the trial court's statement that it had considered all of the proffered mitigation satisfied *Eddings*. *Id.* at 859. "The due process clause does not require that the sentencing court exhaustively document its analysis of each mitigating factor as long as a reviewing federal court can discern from the record that the state court did indeed consider all mitigating evidence offered by the defendant." *Id.* at 858. (citing *Parker v. Dugger*, 498 U.S. 308, 314–15 (1991) (statement by the sentencing court that it considered all mitigating evidence adequate)).

More recently, this Court embraced the tenet, that a court is presumed to have considered all mitigating evidence where the court so states, in *Lopez v. Schriro*, 491 F.3d 1029, 1037 (9th Cir. 2007). In that case, Lopez argued that the trial court made contradictory statements at the aggravation/mitigation hearing which suggested that she was excluding from

consideration a "whole category of mitigation evidence." 491 F.3d at 1037. This Court found that, although the sentencing court's statements were susceptible to differing interpretations, Lopez's interpretation, read in isolation, was not enough to overcome the presumption that the state court knew and followed the law. *Id.* Moreover, this Court further found:

> Under AEDPA, we must do more than find the statement ambiguous—we would have to conclude that the Arizona Supreme Court was *objectively unreasonable* in concluding the sentencing court did, in fact, review all the proffered mitigating evidence.

Id. at 1037–38. (Emphasis in original.)

In the instant case, the panel decision fails to give any deference to the Arizona Supreme Court's finding that it considered all of the proffered mitigation evidence. The Arizona Supreme Court found, as in *Lopez*, that although the trial court failed to list all of the proffered mitigation in its special verdict, it nonetheless considered all of the proffered mitigation evidence. *Styers*, 177 Ariz. at 117, 865 P.2d at 778. Likewise, the Arizona Supreme Court stated that it considered all of the *proffered* mitigation evidence in its independent review of Styers' death sentence. *Id.* The panel's decision failed to properly presume that the state court followed the law. Moreover, there was nothing presented to the panel for it to overcome the presumption that the Arizona Supreme Court knew

and followed the law. In light of the standard of review mandated by the AEDPA, this Court should reconsider the panel's decision.

II

THE PANEL MISREADS THE ARIZONA SUPREME COURT'S OPINION AND MISINTERPRETS *SMITH v. TEXAS*.

The failure to presume that the Arizona Supreme Court knew and followed the law notwithstanding, the panel's decision is based on a flawed interpretation of *Smith v. Texas*, 543 U.S. 37 (2004), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). According to the panel, those cases hold that a sentencer must give substantial weight to *any* mitigating evidence proffered by a capital defendant:

> In conducting its independent review of the propriety of Styers' death sentence, the Arizona Supreme Court stated that it had "considered all of the proffered mitigation," *see Styers*, 177 Ariz. at 117, 865 P.2d at 778. However, its analysis prior to this statement indicates otherwise.
>
> With regards to the evidence that Styers suffered from post-traumatic stress disorder as a result of his combat service in Vietnam, the court stated the following:

> This could also, in an appropriate case, constitute mitigation. *See State v. Bilke*, 162 Ariz. 51, 53, 781 P.2d 28, 30 (1989) . . . *However*, two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the conspiracy and the murder.
>
> *Styers*, 177 Ariz. at 116, 865 P.2d at 177. (Italics added.)

The court's use of the conjunctive adverb "however," following its acknowledgment that such evidence "could" in certain cases constitute mitigation, indicates that this was not such a case.

. . .

In applying this type of nexus test to conclude that Styers' post traumatic stress disorder did not qualify as mitigating evidence, the Arizona Supreme Court appears to have imposed a test directly contrary to the constitutional requirement that all relevant mitigating evidence be considered by the sentencing body.

Styers v. Schriro, 2008 WL 4661819 *7. (Citing *Smith v. Texas*, 543 U.S. at 45.)

The panel opinion should be reconsidered because it misinterprets both the Arizona Supreme Court's opinion and the relevant case law. The panel has mischaracterized the Arizona Supreme Court's legal conclusion and analysis. The Arizona Supreme Court did not decline to *consider* Styers' proffered mitigation regarding his diagnosis of post-traumatic stress disorder. Instead, the state court determined that the proffered mitigating evidence of post-traumatic stress disorder was not mitigating.

Likewise, the panel's reliance on *Smith* is unavailing. In *Smith*, the Supreme Court found unconstitutional a sentencing scheme that negated jurors' ability to consider and give effect to mitigation evidence if the evidence did not directly relate to two statutorily specified issues. 543 U.S. at 47. In that case, before the jury reached its sentence, the trial judge gave a supplemental instruction directing the jury to give effect to mitigation evidence, but allowed the jury to do so only by negating what would otherwise be affirmative responses to the special issues instruction relating to deliberateness and future dangerousness. *Id.* at 38.

The Court, relying on its holding in *Tennard v. Dretke*, 542 U.S. 274 (2004), reiterated that "the jury must be given an effective vehicle with which to weigh mitigating evidence so long as the defendant has met a 'low threshold of relevance,' which is satisfied by 'evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" 542 U.S. at 284–85 (quoting *McKoy v. North Carolina*, 494 U.S.

433, 440 (1990)). The Court found that the supplemental jury instruction given in *Smith* was similar to the one found unconstitutional in *Penry v. Johnson (Penry II)*, 532 U.S. 782 (2001). There the Court held:

> We generally presume that jurors follow their instructions. Here, however, it would have been both logically and ethically impossible for a juror to follow both sets of instructions. Because Penry's mitigating evidence did not fit within the scope of the special issues in the manner prescribed on the verdict form necessarily meant ignoring the command of the supplemental instruction.
>
> . . .
>
> The supplemental instruction therefore provided an inadequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence.

Id. at 799–800.

Thus, *Smith* and *Tennard* stand only for the proposition that a sentencer cannot be precluded from *considering* proffered mitigation evidence. *Smith* and *Tennard* do not support an assertion that the sentencer cannot determine the weight to be afforded proffered mitigation based on its causal nexus to the crime. In its independent review of Styers' death sentence, the Arizona Supreme Court did not unreasonably apply Supreme Court precedent. Unlike in *Smith*, there

were no jury instructions barring the consideration of Styers' proffered mitigation, and in fact the evidence was considered by a sentencer (a state trial judge) who is presumed to know and follow the law. Styers was not barred from presenting mitigation evidence and the state court considered all of his proffered mitigation evidence.

In considering Styers' mitigating evidence of PTSD, the Arizona Supreme Court found that it was not particularly relevant in this case. By stating that Styers' evidence of post-traumatic stress disorder could have been mitigating in another type of case, the Arizona Supreme Court was not saying it did not consider the evidence—the state court was opining that the evidence did not have any particular mitigating weight. This was not a case where Styers' alleged PTSD condition had any connection to the murder of the 4-year-old victim. Styers planned the murder—Styers tricked the victim into believing he was going to see Santa Claus, and took him into the desert and shot the victim in the back of the head. There was no evidence that the murder was the result of any combat flashbacks or combat stress. Styers' condition was not relevant to his murderous act.

Thirty years ago, the United States Supreme Court held that "[t]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Lockett v. Ohio*, 438 U.S. 586, 608 (1978). The Court later held that a capital sentencer must be allowed to consider all relevant mitigating evidence:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence . . . The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings v. Oklahoma, 455 U.S. 104, 114 (1982) (emphasis in original). *See also McKoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring in judgment) ("*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all.").

The Eighth Amendment thus requires only that a sentencer be able to consider and give effect to mitigating evidence proffered by a capital defendant. This Constitutional provision is satisfied unless evidence is "placed beyond the effective reach of the sentencer" and the sentencer is precluded from considering the proffered mitigation in the first instance. *Graham v. Collins*, 506 U.S. 461, 474 (1993); *see also Kansas v. Marsh*, 548 U.S. 163, 175 (2006) ("In aggregate, [this Court's] precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and

oblige sentencers to *consider* that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here."). (Emphasis added.)

In the instant case, the Arizona Supreme Court explicitly stated that, like the trial court, it considered all of the proffered mitigation evidence. *Styers*, 177 Ariz. at 117, 865 P.2d at 778. There is nothing in the state court's opinion indicating that it failed to consider mitigating evidence or that it barred any mitigating evidence from consideration. While the Arizona Supreme Court imposed a causal nexus test in determining the weight to be given Styers' post-traumatic stress disorder, there can be no doubt that the court considered the mitigation in its independent review:

> It is apparent that the trial court considered this evidence, but ultimately found that it was not sufficiently substantial to call for leniency. We will also consider it in our independent review.
>
> . . .
>
> We have considered all of the proffered mitigation, and like the trial court, find it is not sufficiently substantial to warrant leniency.

Id.

The Arizona Supreme Court has made clear, both prior to and after the *Tennard* and *Smith* decisions, that the sentencer in a capital case cannot be

prohibited from *considering* any proffered mitigation, but that the absence of a causal nexus to the crime may be considered in assessing the weight or significance to be afforded the proffered evidence. In *State v. Hoskins*, 199 Ariz. 127, 152, ¶ 113, 14 P.3d 997, 1022 (2000), the court stated:

> The "nexus" or "causal link" requirement in these cases has purpose. Where we determine questions of aggravation and mitigation in the sentencing process, the significant point in time for causation is the moment at which the criminal acts are committed. If the defendant's personality disorder or dysfunctional family background leads reasonable experts to conclude that the disorder in fact caused the crime, significant mitigation is established. But here, the evidence runs counter to that very proposition. The murder was not consistent with the proffered symptoms of personality disorder or family background because it was not an impulsive act, nor was it based on lapse of judgment.

See State v. Pandeli, 215 Ariz. 514, 532, ¶ 72, 161 P.3d 557, 575 (2007) ("Although '[w]e do not require that a nexus between the mitigating factors and the crime be established before we consider the mitigation evidence . . . the failure to establish such a causal connection may be considered in assessing the quality and strength of the mitigation evidence.'"); *see also State v. Sansing*, 206 Ariz. 232, 239, ¶¶ 26–28, 77 P.3d 30, 37

(2003) (absent expert testimony linking cocaine use to defendant's capacity to control his conduct or his capacity to appreciate the wrongfulness of his actions at the time of the murder, defendant did not establish statutory mitigating circumstance or weighty non-statutory mitigation); *State v. Harrod*, 200 Ariz. 309, 320, ¶ 54, 26 P.3d 492, 502 (2001) ("The [sentencing] court found that the absence of Harrod's biological father was not a mitigating factor because there was no evidence that his absence had any causal relationship to Harrod's participation in the murder. We agree.").

The panel's reading of *Tennard* and *Smith* is not only incorrect, but it is directly contrary to United States Supreme Court precedent. "The Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer." *Harris v. Alabama*, 513 U.S. 504, 512 (1995). "As long as evidence of mitigation [i]s not excluded from consideration at the sentencing proceeding," the principles of *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), are not violated. *Barclay v. Florida*, 463 U.S. 939, 961, n.2 (1983) (Stevens, J., concurring).

Thus, in direct contradiction to Supreme Court precedent, the panel wrongly set forth a rule that would require a capital sentencer to give specific mitigating weight to mitigation evidence proffered by a capital defendant, regardless of its quality or relationship to the murder. The panel's new rule has no basis in *Tennard* or *Smith*, and is contrary to *Harris*.

Finally, if this Court believes that the Arizona Supreme Court did not even "consider" the evidence of Styers' post-traumatic stress disorder, Respondents-Appellees request that this Court certify the following question to the Arizona Supreme Court:

Does the causal nexus analysis utilized by the Arizona Supreme Court in addressing mitigation evidence preclude consideration of evidence for which there is no causal nexus, or does the analysis simply provide a mechanism for assessing how much weight, if any, should be accorded the proffered evidence?

CONCLUSION

The panel failed to give proper deference to the Arizona Supreme Court's finding that it had considered all of the proffered mitigation evidence. Additionally, the panel erred by misinterpreting *Smith* and *Eddings* regarding the consideration of proffered mitigation evidence. Respondents-Appellees respectfully request that this Court grant this motion for rehearing and petition for rehearing *en banc*. Alternatively, Respondents-Appellees request that this Court certify the question set forth above to the Arizona Supreme Court

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32-1, Rules of the Ninth Circuit Court of Appeals, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 3,204 words.

JEFFREY A. ZICK

No. 07-99003

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES LYNN STYERS, Petitioner-Appellant, -vs- DORA B. SCHRIRO, et.al., Respondents-Appellees.	) ON APPEAL FROM) THE UNITED STATES) DISTRICT COURT FOR) THE DISTRICT OF) ARIZONA,) No. CIV-98-2244

Pursuant to Circuit Rule 28–2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, Respondents state that they are unaware of any related cases.

DATED this 5th day of November, 2008.

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(2)

Supreme Court, U.S.
FILED
081350 MAR 11 2009
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

VS.

JAMES LYNN STYERS,

Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

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SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX C

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES LYNN STYERS,	)	No. 07-99003
Petitioner - Appellant,	)	D.C. No. CV-98-02244-PHX-EHC
v.	)	District of Arizona, Phoenix
DORA B. SCHRIRO, Arizona Department of Corrections,	)	ORDER
Respondent – Appellee.	)	

Before: KOZINSKI, Chief Judge, FARRIS and BEA, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Chief Judge Kozinski and Judge Bea vote to deny the petition for rehearing en banc, and Judge Farris so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

James Lynn Styers,	) CV-98-2244-PHX-EHC
Petitioner,	)
v.	) DEATH PENALTY CASE
Dora B. Schriro, et al.,	) ORDER
Respondents.	)

Before the Court is Petitioner's Motion to Alter or Amend Judgment. (Dkt. 130.) The motion is brought in response to the Court's orders denying Petitioner's amended habeas corpus petition and issuing a certificate of appealability. (Dkts. 126, 128.) Petitioner challenges the Court's denial of Claim 5, which contested the state court finding that the "especially heinous, cruel, or depraved" aggravating factor, A.R.S. §13-703(6), had been proved.[1]

DISCUSSION

A motion under Rule 59(e) of the Federal Rules of Criminal Procedure is essentially a motion for reconsideration. Motions for Reconsideration are

[1] In the alternative, Petitioner asks the Court to issue a certificate of appealability with respect to Claim 5.

disfavored and appropriate only if the court is presented with newly discovered evidence, if there is an intervening change in controlling law, or if the court committed clear error. *McDowell v. Calderon*, 197 F3d 1253, 1255 (9th Cir. 1999) (per curiam); *see School Dist. No. 1J, Multnomah County Or. V. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). A motion for reconsideration is not a forum for the moving party to make new arguments not raised in its original briefs, *Northwest Acceptance Corp. v. Lynnwood Equipment, Inc.*, 841 F.2d 918, 925-926 (9th Cir. 1988), nor is it the time to ask the court to "rethink what it has already thought through," *United States v. Rezzonico*, 32 F. Supp.2d 1112, 1116 (D. Ariz. 1998) (quotation omitted).

Petitioner contends that the decision of the Arizona Supreme Court affirming the existence of the "especially heinous, cruel, or depraved" factor was contrary to and involved an unreasonable application of clearly established federal law, under 28 U.S.C. § 2254(d)(1), and was based upon an unreasonable determination of the facts under (d)(2). (Dkt. 130 at 5.) Petitioner does not cite new evidence or a change in law but simply repeats the arguments offered in previous filings. Because these arguments do not show that the Court committed clear error in its prior rulings, the motion must be denied.

In his attack on the Arizona Supreme Court's conclusion that the murder of Christopher Milke evidenced a heinous or depraved state of mind, Petitioner focuses on subsequent decisions of that court, particularly those in which the court discusses the adequacy of jury instructions regarding the

especially heinous or depraved aggravating factor; e.g., *State v. Hampton*, 213 Ariz. 167, 140 P.3d 950 (2006); *State v. Anderson*, 210 Ariz. 327, 111 P.2d 369 (2005). From these decisions Petitioner draws the conclusion that a constitutionally valid construction of the factor requires "a showing of relishing, *and/or* gratuitous violence, *and/or* mutilation." (Dkt. 130 at 10). Because relishing, gratuitous violence, or mutilation were not found with respect to the murder of Christopher Milke, Petitioner contends that the decision of the Arizona Supreme Court upholding the application of the (F)(6) factor entitles him to habeas relief. Petitioner's analysis is flawed.

There is no doubt in Petitioner's case that the Arizona Supreme Court applied the narrowing construction of the (F)(6) factor set forth in *State v. Gretzler*, 135 Ariz. 42, 52, 659 P.2d 1, 11 (1983).[2] *State v. Styers*, 177 Ariz. 104, 115-16, 865 P.2d 765, 776-77 (1993). Instead, Petitioner's contends, as the respondent did in *Lewis v. Jeffers*, "that the Arizona Supreme Court's application of its narrowing construction to the facts of his case nevertheless failed to distinguish his case from cases in which the court did not find the aggravating circumstance." 497 U.S. 764, 780 (1990). This contention is essentially "a claim that the state court simply misapplied its own aggravating circumstances to the facts of his case." *Id.*

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[2] *Gretzler* identified five factors which may lead to a finding of heinousness or depravity: (1) relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; and (5) helplessness of the victim. 135 Ariz. at 52, 659 P.2d at 11.

As this Court previously explained, because habeas relief does not lie for errors of state law, review of the state court's application of the (F)(6) aggravating factor "is limited, at most, to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." *Id.* Therefore, in order to grant relief on Claim 5, the Court must conclude that "no reasonable sentencer," *id.* at 783, could have found that the murder of Christopher Milke was "especially heinous or depraved."

The victim, a four-year-old child in Petitioner's care, was driven to a desert wash and shot three times in the head. Petitioner was convicted of the murder. The trial court found that the murder was especially heinous or depraved, and the Arizona Supreme Court agreed. *Styers*, 177 Ariz. at 115-16, 865 P.2d at 776-77. The finding was based upon the senselessness of the crime and the helplessness of the victim. *Id.*

Under Arizona law, "*[o]rdinarily*," *State v. Trostle*, 191 Ariz. 4, 18, 951 P.2d 869, 883 (1997) (emphasis added), or "*usually*," *State v. Prince*, 206 Ariz. 24, 27 P.3d 114, 117 (2003) (emphasis added), a finding of senselessness or helplessness, standing alone, is insufficient to satisfy the especially heinous or depraved factor. The Arizona Supreme Court, "however, has upheld depravity findings, predicated only on senselessness and helplessness, when a defendant murders a child with whom he maintains a parent or caretaker relationship." *Prince*, 206 Ariz. at 27, 75 P.3d at 117-18 (citing *State v. Milke*, 177 Ariz. 118, 126, 865 P.2d 779, 787 (1993); *Styers*, 177 Ariz. at

116, 865 P.2d at 777; and State v. Lopez, 174 Ariz. 131, 144, 847 P.2d 1078, 1091 (1992)). The execution-style shooting of a four-year-old boy by the child's caretaker, with the child being lured to his death by the promise of a visit to Santa Clause, and with the killing being the culmination of a conspiracy involving the child's mother, is not, with respect to the murderer's state of mind, an ordinary or usual murder. As the Arizona Supreme Court noted, "[t]he circumstances of this crime are indeed shocking, and they separate this crime from the 'norm' of first degree murders." *Styers*, 177 Ariz. at 116, 865 P.2d at 777.

The validity of the Arizona Supreme Court's decision is not affected by the fact that the court based its (F)(6) finding on the senselessness and helplessness factors. The court noted that these circumstances were exacerbated by the particular facts of the crime, including the relationship between Petitioner and the victim and the calculated manner in which that relationship was betrayed. *Id.* at 115-16, 865 P2d at 776-77. The court's handling of the heinous or depraved factor was in accord with the narrowing construction set forth in *Gretzler*, where the court noted that "[e]ither or both of these factors [senselessness or helplessness], considered together with other circumstances present in a particular case, may lead to the conclusion that an offense was heinous or depraved." 135 Ariz. at 52, 659 P.2d at 11. More significantly, the application of the (F)(6) aggravating factor to Petitioner's crime was neither arbitrary or capricious. A rational factfinder could have determined that Christopher's Milke's killer possessed "a vile state of mind at the time of the murder" such

that the crime was appropriately set apart from the norm of first-degree murders. *Id.*

Based on the foregoing, the Court again finds that Petitioner is not entitled to habeas relief on Claim 5 and that Claim 5 is not suitable for the issuance of a certificate of appealability.

Accordingly,

IT IS HEREBY ORDERED denying Petitioner's Motion to Alter or Amend Judgment. (Dkt. 130).

DATED this 2nd day of February, 2007.

s/_____
Earl H. Carroll
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

James Lynn Styers	)	No. CV-98-2244-PHX-EHC
	)	
Petitioner,	)	DEATH PENALTY CASE
	)	
	)	
v.	)	
Dora Schriro, et al.,	)	**ORDER RE: CERTIFICATE OF APPEALABILITY**
	)	
Respondents.	)	

The Court has denied Petitioner James Lynn Styers's petition for a writ of habeas corpus. In the event Petitioner appeals from this Court's judgment, and in the interests of conserving scarce Criminal Justice Act funds that might be consumed drafting an application for a certificate of appealabity to this Court, the Court on its own initiative has evaluated the claims within the petition for suitability for the issuance of a certificate of appealability. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

Rule 22(b) of the Federal rules of Appellate Procedure provides that when an appeal is taken by a petitioner, the district judge who rendered the judgment "shall" either issue a certificate of appealability ("COA") or state the reasons why such a certificate should not issue. Pursuant to 28 U.S.C. §

2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." This showing can be established by demonstrating that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner" or that the issues were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right, and (2) whether the court's procedural ruling was correct. *Id.*

The Court finds that reasonable jurists could debate its resolution of the issues set forth in Claim Seven. The Court therefore grants a certificate of appealability as to these issues. For the reasons stated in the Court's Memorandum of Decision and Order filed simultaneously on this date, as well as the Order regarding the procedural status of Petitioner's claims filed on September 22, 2000 (Dkt. 86), the Court declines to issue a certificate of appealability with respect to the remaining claims and procedural issues.

Based on the foregoing,

IT IS HEREBY ORDERED that the Court grants a Certificate of Appealability as to the following issues:

Whether Claim Seven, alleging a violation of Petitioner's right to effective assistance of counsel at the guilt phase of trial, fails on the merits.

DATED this 9th day of January, 2007.

s/_____
Earl H. Carroll
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

James Lynn Styers)	No. CV-98-2244-PHX-EHC
)	**JUDGMENT**
Petitioner,)	
)	
vs.)	
)	
Dora B. Schriro, et al.)	
)	
Respondents.)	

_____ **Jury Verdict.** This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS THEREFORE ORDERED AND ADJUDGED that the Court having denied Petitioner's Amended Petition for Writ of Habeas Corpus, this action is hereby dismissed. FURTHER ORDERED that the stay of execution entered by the Court on December 17, 1998 is vacated.

Date: January 10, 2007 RICHARD H. WEARE
Clerk/DCE

S/L. Dixon
(By) Deputy Clerk
L. Dixon

cc: all counsel

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

James Lynn Styers	)	CV-98-2244-PHX-EHC
	)	
Petitioner,	)	DEATH PENALTY CASE
	)	
vs.	)	**MEMORANDUM OF**
	)	**DECISION AND ORDER**
	)	
Dora B. Schriro, et al.[1]	)	
	)	
Respondents.	)	

Petitioner James Lynn Styers has filed a petition for writ of habeas corpus alleging that he is imprisoned and sentenced to death in violation of the United States Constitution. (Dkt. 1.)[2] His amended petition, filed September 3, 1999, raised nine claims. (Dkt. 63.) In an Order dated September 22, 2000, the Court determined that Claims 1, 2, 6, and 8 were procedurally barred and that Claim 9 lacked merit.

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[1] Dora B. Schriro is substituted for her predecessor, Terry Stewart, as Director, Arizona Department of Corrections. Fed.R.Civ P.25(d)(1).

[2] "Dkt." Refers to the documents in this Court's file. "ROA-PCR" refers to the post-conviction record in state court (CR-96-410-PC). "ME" refers to the minute entries of the state court. "RT" refers to the court reporter's transcript.

(Dkt. 86.) The Court found that the remaining claims were properly exhausted and subject to review on the merits. (*Id.*) Petitioner submitted a brief on the merits of these claims. (Dkt. 90.) Respondents filed a response (Dkt. 97) and Petitioner filed a reply (Dkt. 101).

This Order addresses the merits of Claims 3, 4, 5, and 7. For the reasons set forth herein, the Court finds that Petitioner is not entitled to habeas relief.

BACKGROUND

The following factual summary is taken in part from the decision of the Arizona Supreme Court upholding Petitioner's murder conviction and death sentence. *State v. Styers*, 177 Ariz. 104, 108-09, 865 P.2d 765, 769-70 (1993).

Petitioner and his daughter shared an apartment with co-defendant Debra Milke and her son, four-year-old Christopher Milke. Petitioner, unemployed and disabled, watched Christopher during the day while Milke was at work and at night and on weekends when Milke was out with friends.

On Saturday, December 2, 1989, Petitioner and Christopher left the apartment at around 11:00 a.m, ostensibly for a trip to the Metrocenter shopping mall, where, Christopher was told, they would visit Santa Clause. Milke allowed Petitioner to use her car; his vehicle was in disrepair, and he could not afford to get it fixed.

Petitioner and Christopher picked up Petitioner's friend, co-defendant Roger Scott. Petitioner drove Scott to two drugstores and then the two men and Christopher ate lunch at a pizza parlor. After lunch, they drove out to a desert area in northwest Phoenix, where Christopher was shot to death.

Petitioner and Scott then drove to Metrocenter. They arrived at around 2:30 p.m. They separated, and Petitioner began to enact the ruse that Christopher had gone missing at the mall. He enlisted the help of a Sears employee, explaining that Christopher had disappeared from the Sears restroom. While Petitioner and the employee were searching the mall, they ran into Scott, Petitioner, feigning surprise at the encounter, asked Scott if he had seen Christopher, and Scott replied that he had not. Petitioner called mall security at 2:30 p.m. The police were called around 4:00 p.m. In his conversations with the officers, Petitioner repeated the story that he brought Christopher to Metrocenter to see Santa Claus and that he had disappeared from the Sears restroom while Petitioner was in a stall.

Later that evening, when Petitioner and a police officer were retracing Petitioner's activities, Petitioner first mentioned that he had been with Scott that day. Petitioner said that he, Christopher, and Scott ran errands and then ate lunch. He said that he took Scott home and then went to the mall with Christopher.

Petitioner called Debra Milke several times while the police were searching Metrocenter.

Petitioner stayed with the police at the mall until 3:00 a.m. Officers took him to the police station to get a taped statement, then took him home. Petitioner was arrested on Sunday evening, December 3.

Scott led police to Christopher's body in the desert wash. Christopher had been shot three times in the back of his head. On a road leading from the scene of the murder, police located a number of spent .22 caliber shell casings and one live .22 round that were similar to bullets found in Petitioner's possession and similar to the bullets removed from the child's head. Police also located a pair of black tennis shoes belonging to Petitioner which had been secreted in the parking lot near the Sears store. The shoes had a tread pattern similar to prints found next to Christopher's body in the wash.

Petitioner was indicted on counts of first-degree murder, conspiracy to commit first-degree murder, child abuse, and kidnapping. A jury convicted him of all charges. (ROA-PCR 76.) With respect to the murder count, the trial court found three statutory aggravating factors: that Petitioner was an adult and the victim was under age fifteen, pursuant to A.R.S. § 13-703(F)(9); that the murder was committed in expectation of pecuniary gain, under § 13-703(F)(5); and that the murder was committed in an especially heinous and depraved manner, under § 13-703(F)(6). (*Id.* at 3-5.) Finding no statutory mitigating factors and no nonstatutory factors sufficiently substantial to call for leniency, the court imposed the death penalty. (*Id.* at 3-7.)

On direct appeal, the Arizona Supreme Court reversed Petitioner's conviction for child abuse but affirmed Petitioner's other convictions and sentences. *Styers*, 177 Ariz. at 111, 117, 865 P.2d at 772, 778. Petitioner filed a motion for reconsideration in the Arizona Supreme Court; it was denied on February 16, 1994. Petitioner unsuccessfully sought certiorari review in the United States Supreme Court. *Styers v. Arizona*, 513 U.S. 855 (1994).

In September 1995, Petitioner filed a petition for post-conviction relief (PCR) in the trial court (PCR court) pursuant to Rule 32 of the Arizona Rules of Criminal Procedure. (ROA-PCR 90.) The PCR court dismissed the petition. (ME 1/25/96.) Petitioner filed a petition for review in the Arizona Supreme Court in which he argued that the PCR court erroneously found his claims precluded. The Arizona Supreme Court then remanded the case to the PCR court for consideration of the original petition. The PCR court held an evidentiary hearing and denied the petition on the merits. (ME 10/20/97.) Petitioner filed another petition for review in the Arizona Supreme Court, and it was summarily denied on November 17, 1998. Petitioner filed his initial petition for writ of habeas corpus in this Court on December 16, 1998. (Dkt. 1.)

AEDPA STANDARD FOR RELIEF

Petitioner's habeas claims are governed by the applicable provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Under the AEDPA, a petitioner is not entitled to habeas relief on any claim

"adjudicated on the merits" by the state court unless that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The phrase "adjudicated on the merits" refers to a decision resolving a party's claim which is based on the substance of the claim rather than on a procedural or other non-substantive ground. *Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004). The relevant state court decision is the last reasoned state decision regarding a claim. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991)); *Insyxiengmay v. Morgan*, 403 F.3d 657, 664 (9th Cir. 2005).

"The threshold question under AEDPA is whether [petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under subsection (d)(1), the Court must first identify the "clearly established Federal law, " if any, that governs the sufficiency of the claims on habeas review. "Clearly established" federal law consists of the

holdings of the Supreme Court at the time the petitioner's state court conviction became final. *Williams*, 529 U.S. at 365; *see Musladin v. Lamarque*, 427 F.3d 653, 655 (9th Cir. 2005) ("AEDPA limits the source of clearly-established federal law to Supreme Court cases"); *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th 2003). Habeas relief cannot be granted if the Supreme Court has not "broken sufficient legal ground" on a constitutional principle advanced by a petitioner, even if lower federal courts have decided the issue. *Williams,* 529 U.S. at 381. Nevertheless, while only Supreme Court authority is binding, circuit court precedent may be of "persuasive value" in determining what law is clearly established and whether a state court applied that law unreasonably. *Musladin*, 427 F.3d at 655 (collecting cases); *see Clark*, 331 F.3d at 1069.

The Supreme Court has provided guidance in applying each prong of § 2254(d)(1). The Court has explained that a state court decision is "contrary to" the Supreme Court's clearly established precedents if the decision applies a rule that contradicts the governing law set forth in those precedents, thereby reaching a conclusion opposite to that reached by the Supreme Court on a matter of law, or if it confronts a set of facts that is materially indistinguishable from a decision of the Supreme Court but reaches a different result. *Williams*, 529 U.S. at 405-06; *see Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). In characterizing the claims subject to analysis under the "contrary to" prong, the Court has observed that "a run-of-the-mill state-court decision applying the correct legal rule to the facts of the prisoner's case would not

fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Williams*, 529 U.S. at 406; *see Lambert*, 393 F.3d at 974.

Under the "unreasonable application" prong of § 2254(d)(1), a federal habeas court may grant relief where a state court "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular . . . case" or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407. In order for a federal court to find a state court's application of Supreme Court precedent "unreasonable" under § 2254(d)(1), the petitioner must show that the state court's decision was not merely incorrect or erroneous, but "objectively unreasonable." *Id.* at 409; *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam).

Under the standard set forth in § 2254(d)(2), habeas relief is available only if the state court decision was based upon an unreasonable determination of the facts. *Miller-El v. Dretke*, 545 U.S. 231, 240, 125 S. Ct. 2317, 2325 (2005) (*Miller-El II*). A state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (*Miller-El I*); *see Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). In considering a challenge under 2254(d)(2), state court factual determinations are presumed to be

correct, and a petitioner bears the "burden of rebutting this presumption by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Miller-El II*, 545 U.S. at 240, 125 S. Ct. at 2325. However, it is only the state court's factual findings, not its ultimate decision, that are subject to 2254(e)(1)'s presumption of correctness. *Miller-El I*, 537 U.S. at 341-42. ("The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions.").

As the Ninth Circuit has noted, application of the foregoing standards presents difficulties when the state court decided the merits of a claim without providing its rationale. *See Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003); *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002); *Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000). In those circumstances, a federal court independently reviews the record to assess whether the state court decision was objectively unreasonable under controlling federal law. *Himes*, 336 F.3d at 853; *Pirtle*, 313 F.3d at 1167. Although the record is reviewed independently, a federal court nevertheless defers to the state court's ultimate decision. *Pirtle*, 313 F.3d at 1167 (citing *Delgado*, 223 F.3d at 981-82); *see also Himes*, 336 F.3d at 853. Only when a state court did not decide the merits of a properly raised claim will the claim be reviewed de novo, because in that circumstance "there is no state court decision on [the] issue to which to accord deference." *Pirtle*, 313 F.3d at 1167; *see also Menendez v. Terhune*, 422 F.3d 1012, 1025-26 (9th Cir. 2005); *Nulph v. Cook*, 333 F.3d 1052, 1056-57 (9th Cir.

2003).

DISCUSSION

CLAIM THREE:

Petitioner alleges that the Arizona courts violated his due process rights and his right to be free from double jeopardy by "double-counting" the age of the murder victim as more than one aggravating circumstance. Specifically, Petitioner contends that the trial court improperly double-counted the victim's age for purposes of aggravating Petitioner's sentence when it determined that the murder was committed in an especially heinous and depraved manner, pursuant to A.R.S. § 13-703(F)(6), and also applied § 703(F)(9), which establishes the age of the victim (if under fifteen or over seventy) as an aggravating factor. This claim is without merit.

On direct appeal, Petitioner argued that the victim's age may constitute only one aggravating circumstance. (Opening Br. at 15-16; Reply Br. at 12-13). The Arizona Supreme Court rejected the double-counting argument, holding that the trial court's application of the aggravated factors was constitutionally valid:

> Christopher was four years old and defendant was 42. Defendant claims that the trial court gave the victim's age double weight by using the age to support two aggravating factors – A.R.S. § 13-703(F)(6) and (F)(9). The trial court did rely, in part, on Christopher's

> young age in finding that he was a helpless victim for purposes of the (F)(6) factor. The use of one fact to establish two aggravating circumstances is proper, provided the court, in balancing the aggravating and mitigation factors, does not *weigh* the young age of the victim twice. It is but one fact; therefore, it cannot be weighed twice even though it satisfies two separate aggravating factors.
>
> The defendant did not raise the "double-counting" point in the trial court. The trial court's special verdict did not expressly recite that it weighed the victim's young age only once. However, trial judges "are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona*, 497 U.S. 639, 653, 110 S.Ct. 3047, 3057, 111 L.Ed.2d 511 (1990); *State v. Forteson*, 8 Ariz.App. 468, 473, 447 P.2d 560, 565 (1968) ("On appeal it is our duty to presume that the trial court acted properly."). Therefore, we presume the trial court made proper use of the victim's age and we find no error. In conducting our independent review and weighing of aggravating and mitigating circumstances, we will consider the age of the victim only once.

Styers, 177 Ariz. at 116, 865 P.2d at 777.

This ruling is neither contrary to nor an unreasonable application of clearly established federal law. First, the United States Supreme has noted that, "We have never held that aggravating factors could be

so duplicative as to render them constitutionally invalid." *Jones v. United States*, 527 U.S. 373, 398 (1999). Next, as the Arizona Supreme Court correctly noted, judges are presumed to know and follow the law, "even when they fail to so indicate." *Jeffers v. Lewis*, 38 F.3d 411, 415 (9th Cir. 1994). Therefore, the trial court is presumed to have applied the law correctly and weighed the victim's age only once when sentencing Petitioner. Nothing in the record rebuts that presumption. Furthermore, the Arizona Supreme Court has noted that it was not inappropriate for the trial court to use the child's age as a factor in finding helplessness pursuant to § 13-703(F)(6). *See State v. Gallegos*, 178 Ariz. 1, 15, 870 P.2d 1097, 1111 (1994) (impermissible double-counting did not occur when the court applied both the (F)(9) and (F)(6) factors even though the helplessness finding was based upon the age and size of the eight-year-old victim). The trial court considered other circumstances in finding that the victim was helpless, including the fact that the child trusted and depended upon Petitioner as a parental figure. (ROA-PCR at 5-6.) Finally, the supreme court explicitly stated that in its independent review of Petitioner's death sentence, it weighed the victim's age only once, *Styers*, 177 Ariz. at 116, 865 P.2d at 777. *See Clemons v. Mississippi*, 494 U.S. 738, 750, 754 (1990) (finding that appellate courts are constitutionally permitted to affirm a death sentence based on independent re-weighing despite sentencing error); *Wainwright v. Goode*, 464 U.S. 78, 86-87 (1983) (finding no constitutional violation because, regardless of what the sentencing judge considered, the state supreme court did not consider anything improper in conducting its independent reweighing of aggravation

and mitigation).

For the reasons set forth above, Petitioner is not entitled to relief on Claim Three.

CLAIM FOUR:

Petitioner alleges that the evidence was not sufficient to make the requisite finding under *Enmund v. Florida*, 458 U.S. 782, 797 (1982), that he actually killed, attempted to kill, or intended to kill Christopher Milke. Therefore, according to Petitioner, imposition of the death penalty violates his Eighth Amendment rights.

In *Enmund*, the Supreme Court held that a felony murder defendant is eligible for the death penalty only if he actually killed, attempted to kill, or intended to kill the victim. 458 U.S. at 797. In *Tison*, the Court expanded Enmund's rule so that a felony murder defendant could be sentenced to death if the defendant was a major participant in the underlying felony and acted with reckless indifference to human life. 481 U.S. at 157-58; *see also Greenawalt v. Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991) (*Enmund* satisfied when defendant knowingly created a grave risk of death and was an active participant in the felonies).

A state court's finding that *Enmund/Tison* is satisfied is sufficient if "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact" could have made the finding beyond a reasonable doubt. *Jackson v. Virginia*, 443

U.S. 307, 319 (1979). On habeas review, the provisions of the AEDPA demand an additional level of deference: a state court's findings regarding *Enmund/Tison* are factual determinations which are presumed correct and which Petitioner "bears the heavy burden of overcoming." *Cabana v. Bullock,* 474 U.S. 376, 377-78 (1986), *abrogated on other grounds by Pope v. Illinois,* 481 U.S. 497, 503 n.7 (1987); *see* 28 U.S.C. § 2254(e)(1) (petitioner bears the burden of overcoming by "clear and convincing evidence" the presumption of correctness applicable to a state court's factual determinations); *Revilla v. Gibson,* 283 F.3d 1203, 1211 (10th Cir. 2002) (same).

The jury convicted Petitioner of first-degree murder, under both premeditation and felony-murder theories, and conspiracy to commit first-degree murder. (ROA-PCR 76.) In its special verdict, the trial court found "beyond a reasonable doubt that the defendant killed and intended to kill the victim herein." (*Id.* at 2.)

Petitioner presented this claim on direct appeal. (Opening Br. at 17-20.) The Arizona Supreme Court rejected the argument that the trial court's findings were not supported by sufficient evidence:

> Defendant owned the tennis shoes found in the parking lot near the Sears store and which had a tread pattern similar to the partial prints found in the wash near the body. Defendant purchased two .22 caliber weapons shortly before the murder, one of which was found in Scott's apartment and could have fired the

> bullets found in the victim's head. Defendant possessed bullets like those found along the road near the wash. Defendant participated in the two day charade at Metrocenter where he told police that Christopher had disappeared from a restroom. During that time, he did not, for several hours, even mention Scott's name, or that Scott had been with defendant and Christopher that day. Defendant now claims that Scott killed Christopher; yet defendant participated in the phantom search with the police without mentioning Scott.

Styers, 177 Ariz. at 114, 865 P.2d at 775. The court further explained that, "The jury's finding of conspiracy and premeditated murder satisfies *Enmund*. The trial court's finding merely confirms it." *Id.*

Petitioner argues that the circumstantial evidence presented at trial was inadequate to support a determination that Petitioner actually shot Christopher Milke or intended that the child would be killed. This argument is without merit.

As noted, the state courts made factual determinations regarding Petitioner's participation in the murder. Petitioner's challenge to these findings is based solely on his own self-serving trial testimony to the effect that co-defendant Scott, acting on his own initiative and without any prior knowledge on Petitioner's part, shot the child and then turned the gun on Petitioner; according to Petitioner, Scott then threatened to harm Debra Milke and Petitioner's

daughter if Petitioner did not cooperate with Scott in the subsequent missing-child ruse. (*See* RT 10/29/90 at 63, 69-71.) The jury, the trial court, and the Arizona Supreme Court rejected this scenario, and it is not supported by the remainder of the evidence adduced at trial, including that summarized by the Arizona Supreme Court, as well as the testimony of witnesses who reported that Petitioner appeared calm and in good spirits while carrying out the sham search for Christopher Milke at the Metrocenter Mall. (*See* RT 10/16/90 at 59, 60, 129.) During the course of the lengthy search, Petitioner was away from Scott's presence, was frequently in the company of police officers, and was allowed to make private phone calls, yet he failed to inform anyone of Christopher Milke's fate. (*See, e.g.,* 10/29/90 at 125, 128.)

Viewing the evidence in the light most favorable to the prosecution, a rational factfinder could easily find sufficient evidence showing that Petitioner was a major participant in the underlying felonies and that he acted with reckless indifference to human life under *Enmund/Tison*. Petitioner has not presented clear and convincing evidence to overcome the presumption of correctness which attaches to the factual determinations made by the jury, the trial court, and the Arizona Supreme Court. Therefore, Petitioner is not entitled to relief on Claim Four.

CLAIM FIVE:

Petitioner alleges that the application of Arizona's "especially heinous or depraved" aggravating factor was arbitrary in violation of the Eighth and

Fourteenth Amendments. Specifically, Petitioner challenges the determination that the senselessness of the murder and the helplessness of the victim were sufficient to support a finding that the murder of Christopher Milke was committed in an especially heinous or depraved manner pursuant to A.R.S. § 13-703(F)(6).

On direct appeal, the Arizona Supreme Court affirmed the trial court's application of the heinous or depraved aggravating factor. The supreme court first made reference to its discussion in co-defendant Milke's case of the rules applicable to the heinous or depraved factor. *Styers*, 177 Ariz. at 115, 865 P.2d at 776.[3] The court then addressed the application of the factor to Petitioner's offense:

> certainly the victim was helpless and the killing was senseless. The victim, a four-year-old child, trusted defendant, his baby-sitter. Defendant

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[3] In *Milke*, the Arizona Supreme Court acknowledged that the § 13-703(F)(6) aggravating factor is facially vague but correctly noted that the narrowing construction the court has applied to the factor meets constitutional requirements. *State v. Milke*, 177 Ariz. 118, 125, 865 P.2d 779, 786 (1993) (citing *Richmond v. Lewis*, 506 U.S. 40, 47 (1992); *Walton*, 497 U.S. at 654). This narrowing construction, adopted in *State v. Gretzler*, 135 Ariz. 42, 52, 659 P.2d 1, 11 (1983), identified the following factors which may lead to a finding of heinousness or depravity: (1) the apparent relishing of the murder by the killer; (2) the infliction of gratuitous violence on the victim; (3) the needless mutilation of the victim; (4) the senselessness of the crime; and (5) the helplessness of the victim. These factors are non-exclusive. *State v. Mata*, 185 Ariz. 319, 338, 916 P.2d 1035, 1054 (1996).

> used this trust and played upon the child's favorite things – Santa Claus and hunting for snakes – to lure him into a desolate desert wash so he could execute him. Christopher was dependent upon defendant for care while he was away from his mother. He was helpless when defendant and Scott took him and killed him.
>
> Although there was no legal "parent/child" relationship, defendant and victim did share a special relationship in that defendant was the child's full-time caregiver for several months before he killed him. This fact illustrates the depravity of defendant and makes the crime even more senseless and the victim especially helpless as to this defendant.
>
> The circumstances of this crime are indeed shocking, and they separate this crime from the "norm" of first degree murders. The evidence supports the especially heinous and depraved aggravating circumstance.

Id. at 115-16, 865 P.2d at 776-77.

Petitioner's challenge to this ruling is without merit. While the Arizona Supreme Court has observed that ordinarily a finding of helplessness and senselessness is not sufficient to support the heinous or depraved factor, it has never held that such a finding *cannot* satisfy the factor. *See, e.g., State v. Smith*, 146 Ariz. 491, 503, 707 P.2d 289, 301 (1985) (senselessness and helplessness, without other factors, "will [not] ordinarily be determinative on the question of

heinousness or depravity"); *State v. Gretzler*, 135 Ariz. 42, 52-53, 659 P.2d 1, 11-12 (1983) ("The mere existence of senselessness or helplessness in the victim, in isolation, need not always lead to a holding that the crime is heinous or depraved, however."). Indeed, in Petitioner's case, and those of co-defendants Milke and Scott, the Arizona Supreme Court applied its own precedent to determine that the heinousness or depravity factor had been proved based solely on the child's helplessness and the senselessness of the murder. *Milke*, 177 Ariz. at 125, 865 P.2d at 786; *State v. Scott*, 177 Ariz. 131, 143, 865 P.2d 792, 804 (1993). Moreover, contrary to Petitioner's assertion, these cases are not the only instances in which the Arizona Supreme Court has held that helplessness and senselessness alone sufficed for a finding that a murder was heinous or depraved under § 13-703(F)(6). *See State v. Lopez*, 174 Ariz. 131, 144, 847 P.2d 1078, 1091 (1992) (holding that, although cruelty was also present, the heinous and depraved factor was satisfied by the senseless beating of a helpless infant).

Petitioner also challenges the use of helplessness in support of the (F)(6) factor on the grounds that the child's state of helplessness was a function of his age rather than any action taken by Petitioner. The Court disagrees. As the Arizona Supreme Court observed, Christopher Milke was helpless in part because he was in the custody of an adult whom he trusted and who was serving as his care-giver.

The United States Supreme Court has explained that "federal habeas review of a state court's application of a constitutionally narrowed aggravating

circumstance is limited, at most, to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). "A state court's finding of an aggravating circumstance in a particular case . . . is arbitrary or capricious if and only if no reasonable sentencer could have so concluded." *Id.* at 783. This Court concludes that a reasonable sentencer could have determined that Petitioner's offense was heinous and depraved based upon its senselessness and the helplessness of the victim; application of the factor was not, therefore, arbitrary and capricious. Petitioner is not entitled to relief on Claim Five.

CLAIM SEVEN:

Petitioner alleges that trial counsel performed ineffectively during the guilt phase of his trial in violation of his right to effective assistance of counsel under the Sixth and Fourteenth Amendments. Petitioner contends that counsel was ineffective in the following respects: he failed to challenge the jury panel for cause and move for a continuance; he did not object when the jury asked for and was provided a dictionary during deliberations; he failed to object to prejudicial questions asked by the prosecution; he failed to object to the prosecutor's closing argument; and he failed to object to the trial court's consideration of the presentence report.

Clearly established federal law

As previously discussed, when a state court has

addressed the merits of a petitioner's claim of federal constitutional error, a federal court may grant habeas relief only if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see Yarborough v. Gentry*, 540 U.S. 1, 4 (2003) (per curiam); *Woodford v. Visciotti*, 537 U.S. at 21. For a claim alleging ineffective assistance of counsel ("IAC"), the applicable law is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

To prevail under *Strickland*'s two-pronged standard, a petitioner must show that counsel's representation fell below an objective standard of reasonableness and that the deficiency prejudiced the defense. 466 U.S. at 687-88. The inquiry under *Strickland* is highly deferential, and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. To prove deficient performance, a defendant must also overcome "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.*; *see Dows v. Wood*, 211 F.3d 480, 486-487 (9th Cir. 2000). To demonstrate prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Under the AEDPA, the state court's decision is subject to another level of deference. *Bell v. Cone*, 535 U.S. 685, 698-99 (2002). In order to merit habeas relief a petitioner must make the additional showing that the state court's determination that counsel was not ineffective constituted an unreasonable application of *Strickland*. 28 U.S.C. § 2254(d)(1).

Analysis

Petitioner presented these allegations of ineffective assistance in his PCR petition. After an evidentiary hearing, the PCR court found that "Petitioner has failed to establish, by a preponderance of the evidence, both prongs of ineffective assistance of counsel as to all claims raised." (ME 10/20/97 at 2.) Because the PCR court did not provide a rationale for its decision, this Court has independently reviewed the record and determined, for the reasons set forth below, that the state court's decision was objectively reasonable under *Strickland*. *Himes*, 336 F.3d at 853; *Pirtle*, 313 F.3d at 1167.

(1) Failure to challenge the jury panel and move for a continuance

Citing extensive pretrial publicity regarding the murder of Christopher Milke, including media coverage of the recent trial and conviction of co-defendant Debra Milke, Petitioner alleges that trial counsel was ineffective for failing to move to strike the jury panel

for cause and continue the trial.[4]

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[4] In his merits brief, Petitioner raises several new allegations of IAC. He now contends that counsel was ineffective for failing to move for a change of venue, failing to undertake individual voir dire, failing to challenge juror Haley for cause based on the juror's exposure to pretrial publicity, and failing to object to the striking of juror Driscoll, who was dismissed after stating that she could not vote to convict a defendant if doing so would expose him to the death penalty. Petitioner presented none of these claims in either his amended habeas petition or his PCR petition, both of which raised only the issue of IAC based on counsel's failure to move to strike the panel. (Dkt. 64 at 122; ROA-PCR 90 at 12-13.)

Petitioner contends that it was unnecessary to raise in his amended petition each instance of alleged IAC. (Dkt. 101 at 23.) The Court disagrees. Because Petitioner has failed to raise the issues, as required by Rule 2(c) of the Rules Governing Habeas Cases, they are not properly before this Court. *See Mayle v. Felix*, 545 U.S. 644, ___, 125 S. Ct. 2562, 2573 (2005) (citing Rule 2(c), which instructs Petitioner to "specify all grounds of relief available" and to "state the facts supporting each ground"); *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994) (indicating that the only habeas claims a district court will consider are those contained in the habeas petition itself or those raised in an amended petition or statement of additional claims). Moreover, allegations of IAC constitute separate claims, each of which must be exhausted in state court. *See Strickland*, 466 U.S. at 690 (stating that a petitioner making an IAC claim must identify the particular acts or omissions of counsel that are alleged to have been the result of unreasonable professional judgment). The Ninth Circuit has confirmed that a generic IAC claim is insufficient to exhaust particular IAC allegations. *See Moormann v. Schriro*, 426 F.3d 1044, 1056 (9th Cir. 2005); *Carriger v. Lewis*, 971 F.2d 329, 333-34 (9th Cir. 1992) (en banc). Therefore, specific claims of IAC that were not presented in state court are not properly exhausted; rather, they are technically exhausted but procedurally defaulted and therefore unavailable for federal habeas review.

Background:

Jury selection began with a panel of eighty venire members. (*See* Dkt. 90, Ex. A.) Under questioning by the court, forty-nine of these prospective jurors indicated that they had heard of the case. (*See* RT 10/15/90.) Upon further query, twenty-five panel members indicated that they had formed a fixed opinion of Petitioner's guilt; the court excused each of these members. (*Id.*) Seven of the sixteen members who ultimately served as jurors or alternates had heard of the case. (*Id.*) At the conclusion of jury selection, defense counsel put the following comments on the record:

> I discussed with Mr. Levy [the prosecutor], my client, the question of, the issue of venue, and just so that there's no problems in the future, I discussed the possibility of requesting a change of venue due to the recent decision in Debra Milke's case with Mr. Styers. Mr. Styers wishes to proceed with trial.
>
> Also, in speaking with or researching, doing some research with other areas of the state, it appears that Debra Milke's case got significant publicity in other areas of the state. We would be – we wouldn't be assured of getting any fairer jury than we have already.

(*Id.* at 83-84.) After noting that all of the jurors selected had indicated that they could set aside whatever they had heard and judge the case solely on the merits, the court reiterated its understanding that

counsel had decided not to move for a change of venue based on Petitioner's "decision to go forward with trial." (*Id.* at 84.) Counsel indicated that the court was correct. (*Id.*)

In its initial order rejecting this IAC claim, the PCR court found that the "jury voir dire resulted in empaneling a fair and impartial jury." (ME 1/25/96.) Subsequently, during an evidentiary hearing before the PCR court, counsel testified that he did not object to the panel in part because he was aware that other attorneys had made such motions and they had been denied. (RT 10/17/97 at 42.) The court again denied Petitioner's IAC claims. (ME 10/20/97.)

Discussion:

The "prerequisite" for Petitioner's IAC claim is a demonstration of prejudicial pretrial publicity such that, if counsel had moved to strike the panel, there was a reasonable probability that trial court would have granted the motion. *Turner v. Calderon*, 281 F.3d 851, 865 (9th Cir. 2002); *see also Baldwin v. Johnson*, 152 F.3d 1304, 1314 (11th Cir. 1998); *Sharp v. Johnson*, 107 F.3d 282, 286-87 (5th Cir. 1997). As discussed below, because Petitioner has failed to show the existence of prejudicial pretrial publicity, he is unable to demonstrate that the trial court would likely have granted a motion to strike the panel and continue the trial, and he cannot, therefore, satisfy the *Strickland* standard.

A criminal defendant facing trial by jury is entitled to be tried by "a panel of impartial,

'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). To ensure this right, an Arizona trial court can strike a panel due to exposure to pretrial publicity if the defendant shows that the jurors "have formed preconceived notions concerning the defendant's guilt and that they cannot lay those notions aside."[5] *State v. Walton*, 159 Ariz. 571, 580, 769 P.2d 1017, 1026 (1989) (quoting *State v. Chaney*, 141 Ariz. 295, 302, 686 P.2d 1265, 1272 (1984)). A defendant must show that the jury was actually prejudiced by pretrial publicity, or that the publicity was so outrageous that prejudice could be assumed. *Id.*

There is a presumption of prejudice based upon pretrial publicity when a defendant can show that

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[5] Rule 18.4(a) of the Arizona Rules of Criminal Procedure provides that either party may challenge the entire jury panel on the ground that "in its selection there has been a material departure from the requirements of law." In applying this Rule, Arizona courts have explained that while an accused has a constitutional right to be tried by a fair and impartial jury, he is not entitled to be tried by any particular jury. *State v. Greenawalt*, 128 Ariz. 150, 167, 624 P.2d 828, 845 (1981). Therefore, a party who challenges the jury panel has the burden of demonstrating either that the jury was unlawfully empaneled or that the jurors could not be fair and impartial. *Id.*

In determining the merits of a challenge to the panel such as that now advocated by Petitioner – i.e., alleging that a fair and impartial jury cannot be empaneled due to harmful pretrial publicity – the Court employs the standards for assessing prejudice which are applied in motions seeking a change of venue. *Cf. State v. Walton*, 159 Ariz. 571, 580, 769 P.2d 1017, 1026 (1989). For that reason, even if the Court were to consider Petitioner's unexhausted claim that counsel was ineffective for failure to move for a change of venue, the same result would obtain and the Court would find the claim meritless.

jurors were exposed to publicity "so outrageous that it promise[d] to turn the trial into a mockery of justice or a mere formality." *State v. Bible*, 175 Ariz. 549, 563, 858 P.2d 1152, 1166 (1993); *see Chaney*, 141 Ariz. at 302, 686 P.2d at 1272 (prejudice is presumed where pretrial publicity was so extensive and pervasive that it created a "carnival atmosphere"). Pretrial publicity meets this threshold, however, only when it is "so unfair, so prejudicial, and so pervasive that we cannot give any credibility to the jurors' answers during voir dire affirming their ability to decide the case fairly." *Bible*, 175 Ariz. at 565, 858 P.2d at 1168. Where prejudice is not presumed, a defendant bears the burden of proving that pretrial publicity probably deprived him of a fair trial. *Id.* at 566, 858 P.2d at 1169. The focus is on whether the potential jurors "'could not judge impartially the guilt of the defendant.'" *Id.* (quoting *Patton v. Yount*, 467 U.S. 1025, 1035 (1984)); *see Chaney*, 141 Ariz. at 302, 686 P.2d at 1272 (to prove actual prejudice a defendant "must show that the jurors have formed preconceived notions concerning the defendant's guilt and that they cannot lay those notions aside"). In judging the impact of pretrial publicity on a trial, "the relevant inquiry is the effect of the publicity on a juror's objectivity, not the mere fact of publicity." *Id.*

The Court finds that Petitioner has not met his burden of showing either form of prejudice. The Arizona Supreme Court has consistently emphasized that the burden of demonstrating presumed prejudice is "extremely heavy" and that "courts rarely presume prejudice due to outrageous pretrial publicity." *Bible*, 175 Ariz. at 564, 858 P.2d at 1167; *see also State v.*

Stokley, 182 Ariz. 505, 513-14, 898 P.2d 454, 462-63 (1995); *State v. Jones*, 197 Ariz. 290, 307, 4 P.3d 345, 362 (2000); *State v. Bolton*, 182 Ariz. 290, 300, 896 P.2d 830, 840 (1995); *State v. LaGrand*, 153 Ariz. 21, 34, 734 P.2d 563, 576 (1987); *State v. Greenawalt*, 128 Ariz. 150, 162-63, 624 P.2d 828, 840-41 (1981). In none of these cases, nor in any case cited by Petitioner, did the Arizona Supreme Court find presumptive prejudice due to pretrial publicity.

Attempting to demonstrate presumed prejudice, Petitioner notes that twenty-four newspaper articles about the case were published in December 1989, following Christopher Milke's murder, and another thirty-three articles appeared through October 15, 1990, the day of jury selection in Petitioner's case. (Dkt. 101 at 37-38.) While Petitioner's case generated substantial medial interest, the nature of the coverage is distinguishable from the publicity present in those "rare and unusual cases," *Bible,* 175 Ariz. at 565, 858 P.2d at 1168, in which courts have found presumptive prejudice. The media coverage of Petitioner's case was neither as pervasive nor as inflammatory as that in the cases cited by Petitioner, including *Rideau v. Louisiana*, 373 U.S. 723, 726-727 (1963), where the defendant's detailed confession was broadcast on television three times and viewed by potential jurors, and *Sheppard v. Maxwell*, 384 U.S. 333, 350-58 (1966), where massive and sensational publicity led to outrageous trial conduct and a "carnival atmosphere." *See also Coleman v Kemp*, 778 F.2d 1487, 1538-1543 (11th Cir. 1985) (prejudice presumed where a small, close-knit community was exposed to pervasive, prejudicial, and inflammatory press coverage).

Instead, the coverage of Petitioner's case consisted largely of factual reports and was no more egregious than the pretrial publicity that the Arizona Supreme Court declined to hold presumptively prejudicial in the cases cited above.

Petitioner's remaining argument concerning prejudicial publicity relies on statistics from the voir dire process, including the fact that sixty percent of the panel had heard of the case and thirty percent of the original panel members were dismissed because they had formed an opinion of Petitioner's guilt and could not be fair. (Dkt. 90 at 46-47.) These figures do not support a finding of either presumed or actual prejudice.

In *State v. Schmid*, 107 Ariz. 191, 193, 484 P.2d 187, 189 (1971), for instance, all of the empaneled jurors had prior knowledge of the case. Nevertheless, the Arizona Supreme Court held that such a degree of familiarity with the case did not, standing alone, demonstrate a level of prejudice sufficient to necessitate a change of venue. *Id.* Similarly, in *Bible* "almost all" of the 167 prospective jurors had heard about the case, half had an opinion about the defendant's guilt, and twenty-three percent had an unqualified or fixed pinion and were excused for cause. *Bible*, 175 Ariz. at 563, 566 n.6 858 P.2d at 1166, 1169 n.6. All of the jurors selected to serve had read or heard of the case, and two of them had a "qualified" opinion about the defendant's guilt. *Id.* at 563, 858 P.2d at 1166. Despite these statistics, the Arizona Supreme Court held that the defendant failed to show that he was prejudiced by pretrial publicity to the

extent that he was deprived of a fair trial. *Id.* at 566, 858 P.2d at 1169. The court noted that none of the jurors had an unqualified opinion of the defendant's guilt and all of the jurors indicated that they could set aside their qualified opinions and decide the case based on evidence produced at trial. *Id.*

In Petitioner's case, by contrast, only five of the twelve empaneled jurors had heard of the case, none of them expressed even a qualified opinion as to Petitioner's guilt, and the trial court dismissed each of the potential jurors who indicated that he or she had formed a fixed opinion.[6] Based upon these figures, and the voir dire process engaged in by the trial court, Petitioner cannot show actual prejudice.

Finally, as previously noted, the PCR court found that a fair and impartial jury had been

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[6] Statistics in other cases support a finding that the panel in Petitioner's case was not prejudiced by pretrial publicity. For example, courts found that impartial juries were impaneled in *Murphy v. Florida*, 421 U.S. 794, 803 (1975) (twenty of seventy-eight panel members were excused because they had formed an opinion about defendant's guilt); *Hale v. Gibson*, 227 F.3d 1298, 1331-33 (10th Cir. 2000) (thirty-four of thirty-seven jurors questioned had prior knowledge of the case, twelve had opinions regarding defendant's guilt, and six of the twelve were seated on the jury). In *Irvin*, by contrast, over ninety percent of the 430 prospective jurors interviewed held some opinion as to guilt, 268 were dismissed for cause, and eight out of the twelve jurors actually seated stated they believed the defendant was guilty. *Irvin v. Dowd*, 366 U.S. 717, 727. Based on these facts, and the obvious hostility towards the defendant revealed during voir dire, the Court determined the defendant could not have received a fair trial. *Id.*

empaneled. This is a factual determination entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1). *See Wainwright v. Witt*, 469 U.S. 412, 429 (1985); *Thompson v. Keohane*, 516 U.S. 99, 111 (1995); *Hendricks v. Vasquez*, 974 F.2d 1099, 1103 (9th Cir. 1992). Petitioner has not rebutted this presumption with clear and convincing evidence. In addition, his IAC claim fails to take into account the impact of the PCR court's finding, the effect of which is to counter Petitioner's argument that he was prejudiced by counsel's failure to challenge the panel; the court was not likely to grant such a motion when it believed that the jury was fair and impartial.

For the reasons discussed above, the Court concludes that Petitioner is unable to establish that counsel's performance was constitutionally ineffective. Because Petitioner cannot show that a motion to dismiss the jury panel and continue the trial would have been granted, he has not demonstrated prejudice under *Strickland*. Therefore, he is not entitled to relief on his claim that counsel was ineffective for failing to make such a motion.

(2) Failure to object when the jury requested a dictionary

Petitioner alleges that counsel performed ineffectively by failing to object when the jury asked for and was provided a dictionary during their deliberations.

On the morning of November 1, 1990, the jury retired to commence deliberations. Later that day,

according to the court's minute entry, "the jury . . . asked for a dictionary. Counsel do not object and one is provided to them." (ME 11/1/90; Dkt. 90, Ex. B.) The jury returned its verdict the following day.

Petitioner first challenged counsel's performance with respect to this incident in his PCR petition. Respondents, conceding that the jurors' consideration of extraneous information in the form of a dictionary potentially constituted reversible error, requested a hearing. The PCR court, however, summarily dismissed the petition, finding that no material issues of fact or law existed and that the claims were precluded. (ME 1/25/96; Dkt, 90, Ex. C.) The Arizona Supreme Court remanded the matter, and an evidentiary hearing was held on October 17, 1997.

At the hearing, Michael Sralik, the jury foreman, testified that he remembered a dictionary being requested but did not remember if one was provided. (RT 10/17/97 at 6.) Arthur Hanratty, an investigator for Maricopa County, testified that he interviewed the other eleven jurors, none of whom could remember a dictionary being present in the jury room; the jurors signed affidavits to that effect. (Id. at 9-10.) Kathy Jager, a bailiff during Petitioner's trial, testified that a juror requested a dictionary and that she forwarded that request to the judge; she did not see the jurors with a dictionary and "to [her] knowledge" did not provide one. (*Id.* at 13-14.) Ann Schroder, a courtroom clerk, could not recall a request for a dictionary, did not provide one to the jury, and did not recall anyone else providing a dictionary. (*Id.* at 18.) Karen Jones-Jensen, another bailiff, testified that she

seemed to recall a request for a dictionary, possibly to look up the phrase "reasonable doubt," but that she never provided the jury with a dictionary, that she never saw a dictionary in the jury room, and that during her twelve years of service with the judge he had never supplied a jury with a dictionary. (*Id.* at 23-25.) Defense counsel testified that he remembered nothing about a request for a dictionary, but would have objected to one being presented to the jury. (*Id.* at 47-48.)

After the hearing, the PCR court made a findng "that the jury did not utilize a dictionary during their deliberations." (ME 10/20/97.) Petitioner contends, pursuant to § 2254(d)(2), that this finding represented an unreasonable determination of the facts in light of the evidence presented in state court. The Court disagrees.

The PCR court conducted a full and fair hearing and rendered a factual finding that the jury did not use a dictionary. The PCR court's factual determination is entitled to a presumption of correctness under § 2254(e)(1). *Taylor v. Maddox*, 366 F.3d at 1000; *see, e.g., McNair v. Campbell*, 416 F.3d 1291, 1308-09 (11th Cir. 2005) (state court's finding regarding innocuous effect of jury's reading of Bible passages during deliberations was entitled to presumption of correctness). As described above, the court's conclusion was supported by the evidence taken at the evidentiary hearing. Petitioner has pointed to no witnesses or available testimony or other information that was not elicited in state court. Therefore, he has failed to overcome the presumption of correctness with clear

and convincing evidence.

Based upon the PCR court's unrebutted factual determination that the jury did not use a dictionary, Petitioner cannot show that he was prejudiced by defense counsel's failure to object to the jury's request. Petitioner is not entitled to relief on this claim.

(3) *Failure to object to prejudicial questions presented by the prosecution to witnesses at trial*

Petitioner alleges that the prosecutor elicited improper character evidence from several witnesses, including Maureen Sadeik, the stepmother of co-defendant Debra Milke; John Chiulla and Patrick Murphy,[7] neighbors of Petitioner and Milke; Sandra Pickinpaugh, Milke's sister; and Phillip Wolslagel, a state criminalist. Petitioner contends that counsel performed ineffectively by failing to object to the prosecutor's questions. He further alleges that counsel's performance was ineffective with respect to testimony elicited from the criminalist regarding the contents of Petitioner's notebook.

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[7] In his merits brief, Petitioner alleges that counsel should have objected when Mr. Murphy testified about an incident during which he heard Christopher Milke crying and Petitioner told him he "beat his [Christopher's] ass" and that he "enjoyed it." (RT 10/22/90 at 58-59.) Petitioner did not raise this IAC allegation in his amended habeas petition (*see* Dkt. 64 at 22-24) and therefore the Court cannot consider it. *See supra* at 15, n. 4. The Court notes, however, that because the testimony was likely admissible under Arizona Rule of Evidence 404(b) to show motive or intent, counsel did not perform ineffectively by failing to object.

At the evidentiary hearing before the PCR court, counsel testified that his overall trial strategy was to object only when he had a strong basis to do so and when the objectionable testimony was damaging to Petitioner's defense. (RT 10/17/97 at 40, 43.) He further testified that he believed that the prosecutor was emotionally involved in the case and might be seen by the jury as badgering Petitioner. (*Id.* at 41.) In analyzing this claim, the Court notes that counsel's trial strategy with respect to objections is entitled to deference under *Strickland. See e.g., United States v. Mejia-Mesa*, 153 F.3d 925, 931 (9th Cir. 1998) ("While [a defendant] may argue that it may have been better to make a certain objection, a few missed objections alone, unless on a crucial point, do not rebut the strong presumption that counsel's actions (or failures to act) were pursuant to his litigation strategy and within the wide range of reasonable performance.").

Maureen Sadeik: Ms. Sadeik testified for the State. She described her observations of Petitioner's conduct toward Debra Milke during a Thanksgiving dinner, when she noted that Petitioner was "very solicitous" towards Milke and spoke to her using terms of endearment such as "dear and "hon." (RT 10/18/90 at 65.) At the conclusion of her testimony, the prosecutor asked the following question: "Based upon your observations of him and his interaction with Debra and his comments to her, how would you describe the appearance of his attachment or his – how – you know whether he seemed to really like Debra." (*Id.* at 72.) Counsel did not object. (*Id.*) Ms. Sadeik answered that she believed Petitioner "maybe was

falling love with" Milke. (*Id.*)

Petitioner contends that defense counsel should have objected to the prosecutor's question to Ms. Sadeik about Petitioner's relationship with Milke because the question was designed to elicit prejudicial evidence about Petitioner's character and motive. Respondents counter that Ms. Sadeik's testimony was admissible opinion evidence under Rule 701 of the Arizona Rules of Evidence because it was rationally based upon the witness' personal perceptions and was helpful to the jury in that it provided evidence of Petitioner's motive in killing Milke's child.[8] Because the Court concludes that the testimony would likely have been ruled admissible under Rule 701, Petitioner's criticism of counsel's performance is without merit.

Ms. Sadeik made specific, first-hand observations of Petitioner's behavior; clearly, the inference that Petitioner may have been falling in love with Milke was supported by those observations. Her opinion about Petitioner's feelings satisfied Rule 701(a) because it was "predicated upon concrete facts within [her] own observation and recollection." *United States v. Skeet*, 665 F.2d 983, 985 (9th Cir. 1982) ("[b]ecause it

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[8] Rule 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

is sometimes difficult to describe the mental or physical condition of a person, his character or reputation, the emotions manifest by his acts . . . witnesses may relate their opinions or conclusions of what they observed"); *see also State v. Ayala*, 178 Ariz. 385, 388, 873 P.2d 1307, 1310 (Ct.App. 1994); *State v. Amaya-Ruiz*, 166 Ariz. 152, 168, 800 P.2d 1260, 1276 (1990); *United States v. Beck*, 418 F.3d 1008, 1015 (9th Cir. 2005). In addition, evidence concerning the relationship between Petitioner and Milke was relevant to show Petitioner's motive for participating in the conspiracy to murder Milke's child; i.e., that by carrying out the killing he would gain favor with Milke and advance in her affections. Because the testimony was admissible under the rules of evidence, counsel had no basis to object, and if he had objected the objection would likely have been overruled.

Moreover, at the evidentiary hearing before the PCR court, counsel testified that he chose not to object to Ms. Sadeik's testimony because he anticipated that Petitioner would testify and that the topic of his feelings for Milke would be brought out by the prosecutor. (RT 10/17/97 at 45.) Petitioner had also informed counsel that he did in fact have romantic feelings for Milke. (*Id.*)

Respondents further contend that Petitioner was not prejudiced by counsel's performance because, even if an objection had been made and sustained, there was not a reasonable probability that the outcome of the trial would have been different. The Court agrees. The challenged exchange resulted merely in a restatement of the testimony Ms. Sadeik gave earlier

when she described Petitioner's affectionate behavior toward Milke. Moreover, on cross-examination defense counsel elicited testimony helpful to Petitioner. Under his questioning, Ms. Sadeik reiterated her belief that the relationship between Petitioner and Milke was "plutonic" [sic] (*id.* at 73); Ms. Sadeik also conceded that Milke used other people (*id.* at 74) and testified that Petitioner took care of Christopher and appeared to have a good relationship with the child (*id.* at 74, 76). *See Beck*, 418 F.3d at 1015 (noting that cross-examination serves to test the accuracy of the lay witness's testimony).

For the reasons stated above, counsel did not perform ineffectively with respect to Ms. Sadeik's testimony. Therefore, Petitioner is not entitled to relief on this claim.

John Chiulla: Petitioner contends that counsel performed ineffectively because he failed to object when the prosecutor asked Mr. Chiulla if Petitioner was a "heavy drinker" and Chiulla answered in the affirmative. (RT 10/22/90 at 27.) Petitioner argues that such testimony was inadmissible under Arizona Rule of Evidence 404(a). Respondents contend that counsel's performance was not deficient because the testimony was not an attack on Petitioner's character but was admissible under Rule 402 to show that Chiulla was familiar with Petitioner. Respondents also note that the prosecutor made no further mention of Chiulla's testimony regarding Petitioner's drinking habits, so Petitioner was not prejudiced by counsel's failure to object. The Court concludes that, regardless of the admissibility of the testimony, Petitioner has not

shown that counsel's failure to object was either deficient or prejudicial. Counsel arguably made a tactical choice not to draw further attention to testimony which, in the context of the entire trial, was brief and insignificant. *See State v. Noleen*, 142 Ariz. 101, 106, 688 P.2d 993, 998 (1984).

Petitioner also alleges that counsel was ineffective because he failed to object to testimony from Mr. Chiulla indicating that he did not believe Petitioner's version of the crime. On direct examination, Mr. Chiulla recounted a phone conversation with Petitioner in which Petitioner detailed his version of the events surrounding the killing of Christopher Milke and told Mr. Chiulla that co-defendant Scott was the shooter. (*Id.* at 33-37.) On redirect examination, the prosecutor asked Chiulla if he had believed Petitioner's story; Chiulla responded, "Not really." (*Id.* at 49.) Contrary to Petitioner's argument, counsel did object, on relevance grounds, but the objection was overruled. (*Id.*) Because counsel did object to the prosecutor's question, his performance in this instance was not deficient. Petitioner is not entitled to relief on this claim.

Sandra Pickinpaugh: Petitioner alleges that counsel performed ineffectively by failing to object when Ms. Pickinpaugh, responding to the prosecutor's questions, testified that she believed Petitioner would act violently in a negative situation and that his personal circumstances with respect to Ms. Milke constituted a negative environment. (RT 10/22/90 at 53-54.) The testimony occurred during redirect examination. As Respondents correctly note, this line

of inquiry developed during defense counsel's cross-examination of Ms. Pickinpaugh (RT 10/22/90 at 47-48), and therefore counsel was not in a position to object when the prosecutor revisited the issue. *See State v. Soto-Fong*, 187 Ariz. 186, 193, 928 P.2d 610, 617 (1996); *State v. Woratzeck*, 134 Ariz. 452, 454, 657 P.2d 865, 867 (1982). The issue becomes, therefore, whether counsel performed ineffectively by eliciting the testimony during cross-examination. *See Boyde v. Brown*, 404 F.3d 1159, 1174 (9th Cir. 2005).

On cross-examination by defense counsel, Ms. Pickinpaugh testified that in her view Petitioner was a gullible individual who did favors for people; she even accepted counsel's characterization of Petitioner as a kind of "Good Samaritan." (RT 10/22/90 at 47.) Counsel next asked Ms. Pickinpaugh if Petitioner had ever acted violently as a favor for someone; Ms. Pickinpaugh responded that in her recollection Petitioner had never done so. (*Id.*) Counsel then inquired whether Petitioner reacted in a particular way when he was upset or under pressure. (*Id.*) In response to this question, Ms. Pickinpaugh indicated that if Petitioner was in a positive situation he would react in a positive manner but that if he was in a negative situation he would react in a negative way, both toward himself and those around him; he would blame himself but take it out on other people, and he would also become depressed. (*Id.* at 48-49.) On redirect examination, the prosecutor pursued this line of questioning, which produced Ms. Pickinpaugh's testimony that she believed Petitioner could respond violently to a negative situation "[i]f he was pushed far enough." (*Id.* at 54.)

To withstand scrutiny under *Strickland*, "counsel's representation must be only objectively reasonable, not flawless or to the highest degree of skill." *Dows v. Wood*, 211 F.3d at 487 (citing *Strickland*, 466 U.S. at 688-89). Tactical decisions made during trial, such as those Petitioner's counsel made with respect to the questioning of Ms. Pickinpaugh, "are given great deference." *Id.* For example, in *Phyle v. Leapley*, 66 F.3d 154, 159 (8th Cir. 1995), the Eighth Circuit rejected the habeas petitioner's claim that trial counsel was ineffective based on his failure to object to testimony by the key prosecution witness regarding prior violent acts by the petitioner. Applying the "presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, the Court of Appeals emphasized that trial tactics with respect to the questioning of witnesses are entitled to special deference:

> trial lawyers must take into account [broad, highly subjective factors] as they make repeated, instantaneous decisions whether to object to a question, whether to move to strike a damaging unresponsive answer, or whether to move for a mistrial when a witness has delivered an unexpected low blow. When we review such trial decisions, the ineffective assistance standard is high – they are "virtually unchallengeable" – in part because appellate judges cannot recreate from a cold transcript the courtroom dynamics that are an essential part of evaluating the effectiveness of counsel's

> performance. *See* 2 Wayne R. LaFave and Jerold H. Israel, *Criminal Procedure* § 11.10, at 95 (1984).

Phyle, 66 F.3d at 159.

Applying the standard of deference mandated by *Strickland*, the Court finds that counsel was not ineffective in his handling of Ms. Pickinpaugh's testimony on cross-examination. He attempted, with some success, to elicit positive testimony from a State witness. The fact that counsel's tactics also elicited damaging testimony does not amount to constitutionally ineffective assistance of counsel. *See Strickland*, 466 U.S. at 689 (judicial scrutiny of counsel's performance must avoid "second-guessing" because "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable"). Therefore, Petitioner is not entitled to relief on this claim.

Phillip Wolsagel: Petitioner alleges that counsel's performance was ineffective due to his failure to object to information elicited during the testimony of Mr. Wolsagel, a criminalist with the Phoenix Crime Lab. On direct examination by the prosecutor, Mr. Wolsagel testified about an entry in notebook found in Petitioner's apartment. (RT 10/25/90 at 52-53.) The entry, which, according to a handwriting expert, was written by Petitioner, referred to the price for a quantity of cyanide. (*Id.* at 53.) Upon questioning by the prosecutor, Mr. Wolsagel testified that cyanide was a substance with many uses and that he had heard of

cases where it was used to poison humans. (*Id.*) Counsel did not object to the prosecutor's question regarding the uses of cyanide; nor did he raise the subject on cross-examination.

Petitioner contends that the testimony regarding cyanide was inadmissible as irrelevant and overly prejudicial. Respondents contend that counsel's performance was not deficient or prejudicial because the testimony regarding cyanide was admissible to show premeditation. Without resolving the evidentiary issue regarding the testimony's admissibility, the Court finds that counsel's failure to object did not constitute ineffective assistance.

The primary focus of Mr. Wolsagel's testimony was the key forensic evidence presented by the State, including ballistics and footprint evidence linking Petitioner to the murder. Defense counsel cross-examined Mr. Wolsagel thoroughly and vigorously on those topics. (RT 10/25/90 at 59-72.) Apart from the passing reference elicited during the direct examination of Mr. Wolsagel, the State made no further reference to the cyanide issue. Based upon these factors, counsel could have made a tactical decision not to object to the testimony about Petitioner's notebook "because he did not wish to draw undue attention to the testimony or because he felt the jury might think the defendant was trying to conceal more than was actually revealed by the answers." *Noleen*, 142 Ariz. at 106, 688 P.2d at 998.

For the reasons stated above, the Court concludes that Petitioner has failed to demonstrate

that trial counsel's handling of witnesses constituted ineffective assistance under *Strickland*. Therefore, Petitioner is not entitled to relief on this claim.

(4) Failure to object when the prosecutor introduced facts during closing argument that were not adduced at trial.

Petitioner contends that counsel performed ineffectively by failing to object to or rebut several allegedly improper elements of the prosecutor's closing argument. In his amended petition, this claim took the form of an allegation that counsel was ineffective because he "failed to object to the State's improper argument . . . that the person who shot the victim was an accurate shot and co-defendant Roger Scott did not like pistols and could not hit the broad side of a barn." (Dkt. 64 at 24.) This was also the claim raised before the state court in Petitioner's PCR petition. (ROA-PCR 90 at 20.) However, in his brief on the merits, Petitioner fails to discuss this allegation. (Dkt. 90 at 83-91.) Instead, he sets forth a new IAC claim, contending that the counsel performed ineffectively by failing to object when the prosecutor engaged in misconduct by "cloak[ing] himself in the prestige of the government," urging the jury to sympathize with the victim, and unfairly attacking Petitioner's character. (*Id.* at 83-86.) Petitioner's failure to exhaust this claim in state court or present it in his habeas petition render it unavailable for habeas review. *See supra* at note 4.

With respect to the properly-exhausted IAC claim, challenging counsel's failure to object to the

prosecutor's characterization of Scott as a poor shot, Respondents contend that Petitioner abandoned the claim by failing to address it in his brief on the merits. Without determining whether Petitioner has abandoned or waived the issue by failing to support it in his merits brief, the Court concludes that the claim does not entitle Petitioner to habeas relief. Two principles militate against a finding that Petitioner is entitled to relief on this claim. First, trial counsel, "including prosecutors in criminal cases, are given wide latitude in their closing arguments to the jury." *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990). Therefore, in making a closing argument counsel "may summarize the evidence, make submittals to the jury, urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions." *Bible*, 175 Ariz. at 602, 858 P.2d at 1205; *see State v. Dumaine*, 162 Ariz. 392, 402, 783 P.2d 1184, 1194 (1989) ("counsel may comment on and argue all justifiable inferences which can reasonably be drawn from the evidence adduced at trial"). Here, the prosecutor drew reasonable inferences from the testimony of Scott's mother to the effect that Scott was not familiar with handguns. (RT 10/18/90 at 117-18.) Second, reviewing courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689. Trial counsel may properly decide to "refrain from objecting during closing argument to all but the most egregious misstatements by opposing counsel on the theory that the jury may construe their objections to be a sign of desperation or hyper-technicality." *United States v. Molina*, 934 F.2d 1440, 1448 (9th Cir. 1991); *see United*

States v. Necoechea, 986 F.2d 1273, 1281 (9th Cir. 1993) ("Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the 'wide range' of permissible professional legal conduct."); *Dubria v. Smith*, 224 F.3d 995, 1003-04 (9th Cir. 2000) (counsel's failure to object to closing argument in which prosecutor referred to defendant as "the biggest liar you've ever encountered" and defendant's story as a "piece of garbage" did not constitute deficient performance).

Applying these principles, the court cannot find that counsel's failure to object to the prosecutor's comments amounted to deficient performance. Counsel's silence during the prosecutor's closing can reasonably be seen as both an acknowledgment of the wide latitude afforded counsel in making their closing arguments as well as a tactical decision to avoid appearing desperate or disruptive. In fact, at the evidentiary hearing before the PCR court, counsel testified that his decision whether or nor to object was based on his assessment of the jurors' reactions to the prosecutor's arguments. (RT 10/17/97 at 60.)

Supporting this interpretation is the fact that, while defense counsel did not raise any objections during the prosecutor's closing argument, he did respond to the prosecutor's characterization of the evidence concerning Scott's facility with firearms. In his closing argument, counsel, noting that Scott's mother was the only source of information concerning Scott's inexperience with handguns, directly attacked

the credibility of her testimony:

> Now, whose testimony does the State rely on when they tell you Roger Scott didn't like guns, he was afraid of guns, he didn't know how to use a gun? That is simply not true, ladies and gentlemen.
>
> You heard testimony from one person in defense of Roger Scott, that was his mother. And in evaluating the credibility of that lady, first of all, you know it's her son that's been accused of conspiracy to this. She's going to try and protect her son.

(RT 10/31/90 at 69.) Later in his closing argument, counsel recounted Petitioner's testimony, that Scott did in fact own guns and behaved irresponsibly with them. (*Id.* at 90.) These aspects of defense counsel's argument reduced any prejudice from his failure to object to the comments made by the prosecutor.

Complementing defense counsel's effort to counter the prosecutor's comments were the cautionary instructions offered by the court to the jury. Prior to the closing arguments, the court explained that "what counsel tells you is not evidence. The only evidence you're to consider is the testimony of the witnesses and the exhibits. I'm sure counsel will not intentionally misstate any item of evidence to you. In the final analysis, however, it's your individual and collective memories of the evidence that counts." (RT 10/31/90 at 3.) Following the parties' arguments, the court instructed the jury "not to be influenced by sympathy

or prejudice" (RT 11/1/90 at 4) and again explained that what the attorneys say in their closing arguments is not evidence and that the jury "must find the facts from the evidence in court" (*id.* at 5). These instructions sufficiently addressed any prejudice that might have resulted from the prosecutor's closing arguments. *See United States v. Mares*, 940 F.2d 455, 461 (9th Cir. 1991).

Petitioner has failed to show that counsel's performance with respect to the prosecutor's closing argument was either deficient or prejudicial. Therefore, he is not entitled to relief on this claim.

(5) Failure to object to the trial court's consideration of the presentence report

Upon sentencing Petitioner, the trial court indicated that its had received and reviewed a presentence report. (RT 12/14/90 at 3.) The report contained victim impact information, including the recommendations of family members and a police office that Petitioner should receive the death sentence. (ROA-PCR 77.) Contending that the court's review of such information violated his constitutional rights, Petitioner alleges that counsel's failure to object to the introduction of the report constituted ineffective assistance.

In *Booth v. Maryland*, 482 U.S. 496, 509 (1987), the Supreme Court held that the introduction of a victim impact statement during the sentencing phase of a capital case violated the Eighth Amendment. In *Payne v. Tennessee*, 501 U.S. 808, 827, 830 (1991), the

Supreme Court revisited *Booth* and overruled it in part, holding that the Eighth Amendment does not erect a per se barrier to the admission of victim impact evidence but leaving intact *Booth*'s prohibition on the admissibility of characterizations and opinions from the victim's family about the crime, the defendant, or the appropriate sentence to be imposed. *Id.* at 830 n.2.

Under Arizona law at the time of Petitioner's trial, the trial judge, rather than a jury, determined the penalty in a capital case. A.R.S. § 13-703. As noted above, trial judges are presumed to know and apply the law. *Jeffers*, 38 F.3d at 415. Therefore, "in the absence of any evidence to the contrary, [the Court] must assume that the trial judge properly applied the law and considered only the evidence he knew to be admissible." *Gretzler v. Stewart*, 112 F.3d 992, 1009 (9th Cir. 1997); *see also State v. Soto-Fong*, 187 Ariz. at 209, 928 P.2d at 633; *State v. Gulbrandson*, 184 Ariz. 46, 66, 906 P.2d 579, 599 (1995); *State v. Bolton*, 182 Ariz. at 315-16, 896 P.2d at 855-56.

While the trial court reviewed the presentence report, there is no indication that the court ignored applicable law and considered the sentencing requests contained in the report when determining Petitioner's sentence. In the absence of such evidence, this Court, in accordance with *Walton* and *Gretzler*, presumes that the sentencing judge did not improperly consider the victims' opinions. Therefore, defense counsel's failure to object to the presentence report did not constitute IAC pursuant to *Strickland* because counsel was entitled to presume that the trial court would follow the law when passing sentence and because Petitioner

has not shown that he was prejudiced by the failure to object. Petitioner is not entitled to relief on this claim.

Summary

For the reasons set forth above, this Court concludes that the PCR court did not apply *Strickland* unreasonably when it denied Petitioner's IAC claims. Therefore, Petitioner is not entitled to relief on Claim Seven.

Request for Evidentiary Hearing

In his amended habeas petition, Petitioner made a generic request for an evidentiary hearing. (Dkt. 63 at 15.) In his memorandum in support of the petition, Petitioner specifically requested an evidentiary hearing on Claim Eight, IAC at sentencing (Dkt. 64 at 40), a claim which the Court dismissed as procedurally barred (Dkt. 86). In its Order of September 22, 2000, the Court denied Petitioner's motion for an evidentiary hearing without prejudice. (Dkt. 86 at 17.) The Court determined that the request had been premature and invited Petitioner to renew the motion in his brief addressing the merits of non-procedurally-defaulted claims. (*Id.*) In his merits brief, Petitioner did not renew his request for evidentiary development. (Dkt. 90.) However, his reply includes a general request that the Court to hold an evidentiary hearing "in order that he may have an opportunity to develop and further establish these Claims." (Dkt. 101 at 89.) The Court concludes, after reviewing the record, that none of Petitioner's properly-exhausted claims warrant evidentiary development because the allegations

contained therein, even if true, do not entitle him to habeas relief.

CONCLUSION

The Court finds that Petitioner has failed to establish entitlement to habeas relief on any of his claims. The Court further finds that an evidentiary hearing in this matter is neither warranted nor required.

Based on the foregoing,

IT IS ORDERED that Petitioner's Amended Petition for Writ of Habeas Corpus (Dkt. 63) is **DENIED**. The Clerk of Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that the stay of execution entered by this Court on December 17, 1998, is **VACATED**.

IT IS FURTHER ORDERED that the Clerk of Court forward a copy of this Order to Noel Dessaint, Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ 85007-3329.

DATED this 9th day of January, 2007.

s/_____
Earl H. Carroll
United States District Judge

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(3)

No. 08-1350

IN THE
SUPREME COURT OF THE UNITED STATES

DORA SCHRIRO, Director,
ARIZONA DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners,

vs.

JAMES LYNN STYERS,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

**BRIEF IN OPPOSITION TO
PETITIONER'S WRIT OF CERTIORARI**

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CAPITAL CASE

Respondent's Counter Statement of Question Presented

On direct appeal of Styers' death sentence, the Arizona Supreme Court struck an invalid aggravating circumstance, reweighed the remaining aggravating circumstances against mitigating evidence, and affirmed. While the state court remarked that it had "considered all of the proffered mitigation," it also made clear that one category of evidence – proof of Post-Traumatic Stress Disorder (PTSD) caused by Petitioner's Vietnam combat experience – did not "constitute mitigation" at all because the experts "could not connect" that evidence to the capital offense. Accepting the Arizona Supreme Court's own plain statement that the PTSD evidence could not be regarded as "mitigation" because it lacked the requisite nexus, and recognizing that the resulting exclusion of this evidence from the reweighing process contravened this Court's decisions in *Eddings v. Oklahoma*, 455 U.S. 115 (1982), and *Clemons v. Mississippi*, 494 U.S. 738 (1990), the Ninth Circuit held that the state court's decision was contrary to clearly established federal law.

The following question is presented:

> When the basis of a state court's decision, as plainly stated in its opinion, is irreconcilable with rules laid down by this Court, is it appropriate for a federal habeas court to hold that the state court's decision was contrary to clearly established federal law?

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RESPONDENT'S STATEMENT OF THE CASE

During his capital sentencing proceedings, Respondent Styers presented undisputed mitigation evidence which demonstrated that he suffered from a long-standing severe mental illness, as well as neurological impairments resulting from a severe head injury. The evidence showed that in 1967, at age 19, Styers volunteered for service in the United States Marine Corps, where he served honorably in at least twelve different major combat operations in the Vietnam theater during 1968-1969. Shortly after leaving the field of combat, and continuing through the time of his arrest for the instant offense, Styers suffered from symptoms of post-traumatic stress disorder ("PTSD"). Consequent to his illness, Styers endured auditory, visual and tactile hallucinations typically associated with an active psychosis. Styers sought help from the Veterans Administration, but the treatment he received was not successful; he could not maintain employment, and he continually suffered from symptoms of PTSD, including depression, anxiety, and psychosis. Preceding and through the time of his arrest for the subject offense, Styers was treated with a combination of drugs, including Navane and Lithium.[1] The record also showed that

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[1]Lithium is administered to control mania associated with manic-depressive illness and bi-polar disorder, and Navane is a potent anti-psychotic used in the treatment of schizophrenia and psychosis. See Physicians Desk Reference, 50th Ed. at 2201-2202, 2485 (1996).

Styers' psychiatric difficulties were compounded by a traumatic and disabling head injury sustained when he fell from a moving military vehicle and suffered a right occipital skull fracture and a cerebral contusion. As a result of these injuries, Styers was declared permanently disabled and discharged from the military. The record showed that these head injuries left Styers brain damaged, with seizure activity, and organic brain syndrome with mixed features.

On direct review of Styers' death sentence, the Arizona Supreme Court struck one of the aggravating circumstances relied upon by the trial court, and later reweighed the remaining aggravating and mitigating circumstances as required by this Court's decisions. *State v. Styers*, 865 P.2d 765, 778 (Ariz. 1993). Before conducting the reweighing, the state court identified Styers' lack of prior convictions and his honorable military service as "relevant mitigating circumstances."[2] *Id.* at 777. The court then observed that,

> [Styers] also suffered from post-traumatic stress disorder prior to and around the time of the murder as a result of his combat service in Vietnam. This *could* also, *in an appropriate case*, constitute mitigation. ... *However*, two doctors who examined defendant could not connect [Styers'] condition to his behavior at the time of the conspiracy and the murder.

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[2]The state court never mentioned Styers' documented neurological impairments and brain damage in its decision.

Id. at 777 (emphasis added). Finally, in a subsequent section of its opinion, entitled "INDEPENDENT REVIEW," the court stated that it had "considered all of the proffered mitigation and, like the trial court, f[ou]nd it [wa]s not sufficiently substantial to warrant leniency." *Id.* at 778.

After exhausting his state post-conviction remedies, Styers petitioned for a writ of habeas corpus in the district court of Arizona. There Styers alleged that the Arizona Supreme Court's decision affirming his sentence was made contrary to this Court's holding in *Clemons v. Mississippi*, 494 U.S. 738 (1990) (when a sentence rests on an invalid aggravating factor, "only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence"). The district court dismissed Styers' *Clemons* claim on the ground that it had not been exhausted in the state court proceedings. Styers filed a timely appeal to the Ninth Circuit Court of Appeals.

After finding that Styers' *Clemons* claim had been exhausted in the State court proceedings,[3] the Ninth Circuit determined that although the Arizona Supreme Court stated that it had "considered all of the proffered mitigation," it was evident from the plain language of the state court's opinion that its causal nexus requirement had

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[3]Petitioner has not challenged the Ninth Circuit's exhaustion determination before this Court.

resulted in the exclusion of constitutionally relevant evidence from what the state court regarded as "all" of the "mitigation." Citing this Court's decision in *Eddings v. Oklahoma*, 455 U.S. 105, 114-15 (1982), the Ninth Circuit panel recognized that while the state court was free to determine the weight to be given relevant mitigating evidence, it was not at liberty to apply an unconstitutional standard to exclude relevant mitigation from the weighing calculus altogether. *Styers v. Schriro*, 547 F.3d 1026, 1035-36 (9th Cir. 2008). The panel further observed that in *Smith v. Texas*, 543 U.S. 37 (2004), this Court had rejected the use of a nexus requirement for identifying relevant mitigation that was materially indistinguishable from the test employed by the Arizona Supreme Court in Styers' case. *Id.* at 547 F.3d 1035.[4]

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[4]The Ninth Circuit panel vacated the district court's judgment, denying the writ of habeas corpus with instructions to grant the writ with respect to Styers' sentence, "unless the state . . . either corrects the constitutional error in petitioner's death sentence or vacates the sentence and imposes a lesser sentence consistent with law." *Id.* at 547 F.3d 1036.

REASONS WHY THE WRIT SHOULD BE DENIED

I. PETITIONER'S FIRST QUESTION PRESENTED RESTS ON A FUNDAMENTALLY FLAWED PREMISE: THAT THE NINTH CIRCUIT SHOULD HAVE APPLIED 28 U.S.C. § 2254(e)(1) TO THE STATE COURT'S CHARACTERIZATION OF ITS OWN ANALYSIS.

The premise of Petitioner's first Question Presented is that the court of appeals was obligated to apply the § 2254(e)(1) presumption of correctness to the Arizona Supreme Court's statement that it had "considered all of the proffered mitigation ...." (Petition at 11.) Acceptance of this premise would require an unprecedented expansion of the reach of the statutory presumption of correctness. As this Court explained in *Thompson v. Keohane*, 516 U.S. 99 (1995), the statutory presumption of correctness applies only to "'basic, primary, or historical facts: facts "in the sense of a recital of external events and the credibility of their narrators...."'" *Thompson*, 516 U.S. at 110 (quoting *Townsend v. Sain*, 372 U.S. 293, 309 n. 6 (1963) (quoting in turn *Brown v. Allen*, 344 U.S. 443, 506 (1953))). Petitioner neither acknowledges the sweeping change it seeks, nor offers any justification for such a departure from this Court's settled precedents.

What is more, standing alone, the Arizona Supreme Court's statement that it considered Styers' proffered mitigation is all but irrelevant to the question properly asked and answered by the court of appeals: whether the state court applied an

unconstitutional causation/nexus test to exclude relevant mitigation from its weighing calculus. If the state court applied such an unconstitutional test for qualifying mitigation (as the Ninth Circuit correctly determined it did), then the state court decision was contrary to this Court's clearly established precedents within the meaning of 28 U.S.C. § 2254(d)(1).[5] *Eddings v. Oklahoma; supra* (evidence of defendant's personality disorder was constitutionally relevant mitigation despite the fact that it did not provide a legal excuse for the offense); *Smith v. Texas*, 543 U.S. 37, 44-45 (2004) (holding that the state appellate court's nexus to the crime screening test for the identification of relevant mitigation evidence was plainly constitutionally inadequate under the Court's Eighth Amendment precedents).

Subsection 2254(e)(1), provides that "a determination of a factual issue made by a State court shall be presumed to be correct and the applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." This subsection of the statute applies to challenges made to a state court's determination of historical fact; it does not apply (and this Court has never held subsection (e)(1) to apply) to a state court's own legal analysis. The Arizona

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[5]A" state court decision will . . . be contrary to [this Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [this Court's] cases." *Terry Williams v. Taylor*, 529 U.S. 362, 405 (2000).

Supreme Court's legal analysis dwells in its evaluation of Styers' mental illness and whether that evidence could qualify as mitigation. The state court plainly held such evidence could not qualify as mitigation because it lacked an explanatory nexus to the offense. Ignoring that holding on the ground that a subsequent line in the state court's opinion should be presumed correct pursuant to § 2254(e)(1) would require this Court to extend the reach of that provision far beyond where it has ever gone before, and would result in the improper expansion of subsection (e)(1) into territory presently and properly reserved for § 2254(d). Petitioner provides no legal support for such a radical reading of the statute, and its first question presented does not warrant this Court's consideration.

II. PETITIONER'S SECOND QUESTION PRESENTED ALSO RESTS ON A FUNDAMENTALLY FLAWED PREMISE: THAT THE ARIZONA SUPREME COURT ELECTED TO GIVE "LITTLE WEIGHT" TO STYERS' PROFFERED MITIGATION.

It is axiomatic that a state court may not require a capital defendant to establish that his mitigation evidence has an explanatory nexus to the charged offense, as condition to the showing of the constitutional relevance of his proffered mitigation. This rule has been a bedrock principle of this Court's Eighth Amendment jurisprudence for nearly 30 years. *Eddings v. Oklahoma, supra*; *Smith v. Texas, supra*; *Tennard v. Dretke*, 542 U.S. 274, 283-285 (2004).

Prior to this Court's decisions in *Smith* and *Tennard*, the Arizona Supreme Court applied such an unconstitutional nexus-to-the-crime screening test for identifying certain categories of relevant mitigation evidence, and the Arizona Supreme Court employed this improper legal standard when it reviewed Styers' sentence. The plain language of the Arizona Supreme Court's decision is clear; it stated with respect to Styers' mental illness, that "[t]his could also, in an appropriate case, constitute mitigation . . . [h]owever two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the murder." *State v. Styers*, 865 P.2d at 777. The Ninth Circuit properly recognized that in applying this type of nexus test to conclude that Styers' post-traumatic stress disorder did not qualify as mitigation, the state court imposed a test directly contrary to *Eddings v. Oklahoma, supra,* and *Smith v. Texas, supra*. See *Styers v. Schriro*, at 547 F.3d 1035. The Petitioner's objection to this correct result reached by the Ninth Circuit is threefold.

First, it suggests that the Arizona Supreme Court merely accorded little weight to Styers' proffered mitigation. No language in the state court decision supports this premise. Instead, the plain language of the decision itself demonstrates that the state court determined that in the absence of a nexus to the offense, evidence of Styers' mental infirmities could not be considered mitigation in the first instance. The court

decided that with respect to the evidence of Styers' post-traumatic stress disorder, "[t]his could also, in an appropriate case, constitute mitigation . . . [h]owever two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the murder." *State v. Styers, supra.*

Second, the Petitioner argues that the state court could not have applied an unconstitutional test for identifying relevant mitigation, because such a test has never been part of Arizona's jurisprudence and state courts must be presumed to know and follow the law. This argument also easily fails. Contrary to the Petitioner's contention, there is Arizona Supreme Court authority directly on point holding that a defendant must demonstrate that evidence of his mental impairments has a causal nexus to the offense, and failing that, such evidence will not be deemed relevant mitigation, or eligible for inclusion in the weighing calculus. See *State v. Hoskins*, 14 P.3d 997, 1021-22 (Ariz. 2000) (remarking on whether evidence of a defendant's mental impairments or a history of family dysfunction could qualify as relevant mitigation, the Arizona Supreme Court stated that such evidence would be treated as irrelevant, unless a nexus to the offense was proven).

> [M]itigating circumstances must be "relevant in determining whether to impose a sentence less than death . . .." A.R.S. § 13-703(G). If the defendant fails to prove causation, the circumstance will not be considered mitigating. However, if the defendant proves the causal

> link [to the offense] the court then will determine what, if any, weight to accord the circumstance in mitigation.

State v. Hoskins, 14 P.3d 997, 1021-22 (Ariz. 2000).[6]

Third, based on the false premise that the Arizona court only made a weighting decision, the Petitioner argues that the Ninth Circuit wrongly extended *Eddings* and *Smith* to preclude a state court from gauging the weight to be afforded mental health mitigation based on whether it has a nexus to the crime. Once again the factual premise for the argument is erroneous. The Ninth Circuit decision expressly recognized that under *Eddings*, "the sentencer and the appellate court on review, may determine the weight given relevant mitigating evidence." *Styers v. Schriro*, at 547 F.3d 1035. Contrary to Petitioner's argument, the Ninth Circuit decision reflects a proper understanding and application of this Court's precedents.

Taken together, the petition's threefold argument in support of its second presented question would require the Court to engage in tortured readings of no less than three court decisions. First the Court would be required to ignore the plain language of the Arizona Supreme Court opinion in Styers' case, where that court

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[6]Styers agrees with the Petitioner, that after this Court decided *Tennard* and *Smith*, the Arizona Supreme Court appears to have withdrawn from its application of the unconstitutional nexus test. See *State v. Pandelli*, 161 P.3d 557, 575 (Ariz. 2007) (the absence of evidence that mitigation has explanatory nexus to the offense would be applied to the consideration of the strength of the mitigation).

clearly held that evidence related to Styers' post-traumatic stress disorder would not qualify as mitigation in his case because it lacked a nexus to the offense. *State v. Styers, supra*, ("[t]his could also, in an appropriate case, constitute mitigation . . . [h]owever two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the murder"). Second, the Court would have to ignore, or engage in a tortured reading of the decision in *State v. Hoskins*, which also clearly held that lacking a nexus to the offense, evidence of a defendant's traumatic childhood or mental health disabilities would not qualify as relevant mitigation, or be eligible for inclusion in the weighing calculus. Third, the Court would need to construe the Ninth Circuit decision as extending *Eddings* and *Smith* beyond their established parameters, despite the fact that the Ninth Circuit decision expressly indicated that it was not doing so.

Recognizing the frailties in its position, the Petitioner suggests that a question be certified to the Arizona Supreme Court "if this Court believes that the Arizona Supreme Court did not even 'consider' the evidence of Styers' post-traumatic stress disorder." (Petition at 23.) The request for certification is not appropriate. If as the Petitioner has stated, "this Court believes that the Arizona Supreme Court did not even 'consider' the evidence of Styers' post-traumatic stress disorder," the proper response would be to deny the petition and allow the Ninth Circuit decision to stand.

See *City of Houston, Tex. v. Hill*, 482 U.S. 451, 471 (1987) ("[i]t would be manifestly inappropriate to certify a question in a case where, as here, there is no uncertain question of state law whose resolution might affect the pending federal claim"); *Tarr v. Manchester Ins. Corp.*, 544 F.2d 14, 15 (1st Cir.1976) ("[t]he purpose of certification is to ascertain what the state law is, not, when the state court has already said what it is, to afford a party an opportunity to persuade the court to say something else.").

Relying on the plain language of the state court decision, the Ninth Circuit decision correctly determined that the Arizona Supreme Court's application of a nexus test for identifying, and thus excluding relevant mental health mitigation, resulted in a decision that was contrary to this Court's decision in *Eddings v. Oklahoma*. Application of such a nexus test represents a clear departure from this Court's established precedents, qualifying Styers for habeas relief under 28 U.S.C. § 2254(d)(1).

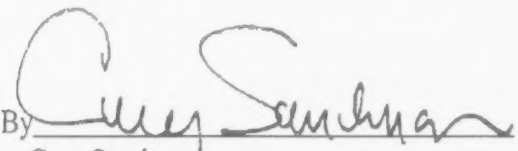
Rule 10 of the Supreme Court states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." There is no issue of importance in this case and the Petitioner seeks nothing more than correction of what it perceives to be an error.

CONCLUSION

The court of appeals correctly decided Styers' federal claim. The petition for certiorari fails to demonstrate any legitimate questions for this Court's review and should be denied.

Dated this 24th day of June, 2009.

WATERFALL, ECONOMIDIS, CALDWELL,
HANSHAW & VILLAMANA, P.C.



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No. 08-1350

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IN THE

SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

VS.

JAMES LYNN STYERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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Capital Case

QUESTIONS PRESENTED

In December 1989, James Lynn Styers took 4-year-old Christopher Milke into the desert and shot him three times in the back of the head. On direct appeal, the Arizona Supreme Court found one aggravating circumstance invalid and re-weighed the remaining aggravating circumstances and proffered mitigation, including alleged post-traumatic stress disorder. In its independent review of Styers' death sentence, the Arizona Supreme Court explicitly stated that it had considered all of the proffered mitigating evidence, but found Styers' proffered mitigation not sufficiently substantial to warrant leniency and affirmed his death sentence. *State v. Styers*, 177 Ariz. 104, 117, 865 P.2d 765, 778 (1993).

A panel of the Ninth Circuit concluded that the Arizona Supreme Court failed to properly re-weigh the mitigation evidence pursuant to *Clemons v. Mississippi*, 494 U.S. 738, 748–49 (1990), because it failed to consider Styers' post-traumatic stress disorder mitigation. *Styers v. Schriro*, 547 F.3d 1026, 1035–37 (9th Cir. 2008) (Pet. App. A, at 19–20.)

1. Under the Anti-terrorism and Effective Death Penalty Act (AEDPA), when a State's highest court explicitly states it has considered proffered mitigation evidence, must a

habeas reviewing court accept that statement, absent clear and convincing evidence to the contrary?

2. This Court has clearly established that a State cannot preclude a capital sentencer from considering or giving effect to relevant mitigation evidence. *Smith v. Texas*, 543 U.S. 37, 45 (2004); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). Here, in considering the proffered mitigation evidence of post-traumatic stress disorder, the Arizona Supreme Court elected to give Styers' evidence no significant mitigating weight because he could not connect his alleged condition to his murderous act. Did the Ninth Circuit violate this Court's jurisprudence by holding that *Smith* forbids a sentencer from relying on the absence of a causal nexus between an alleged mental condition and the crime committed in deciding how much weight to give the proffered mitigation evidence?

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INTRODUCTION

Styers' characterization of this case as having "no issues of importance" (Brief in Opposition, at 12) is simply wrong. Instead, this case provides an extraordinary example of a federal court's failure to properly accord deference under the AEDPA to state court factual findings and state court interpretations of federal law as determined by this Court. This case also presents a question of nationwide significance regarding the extent to which federal courts can dictate to States a particular method of analyzing the significance of mitigation evidence in capital sentencing proceedings.

The Ninth Circuit's ruling eviscerates the deference standard set forth in 28 U.S.C. § 2254. There was nothing unreasonable about the state courts' finding, after considering all of Styers' proffered mitigation evidence, that the mitigation was not sufficiently substantial to warrant leniency. Nor was there anything unreasonable about the state court's use of a causal nexus test in assessing the weight to be given Styers' mitigation evidence. Accordingly, the Ninth Circuit's ruling should be reversed.

I

THE NINTH CIRCUIT FAILED TO GIVE PROPER AEDPA DEFERENCE TO THE ARIZONA SUPREME COURT'S FINDING THAT IT HAD CONSIDERED ALL PROFFERED MITIGATION IN ITS INDEPENDENT REWEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES.

Styers argues that the Ninth Circuit need not give any deference to the Arizona Supreme Court's determination that his proffered mitigation was not sufficiently substantial to warrant leniency. He ignores this Court's precedent mandating that reviewing courts presume that lower courts know and follow the law and instead contends that the Arizona court's findings in reweighing the aggravation against the mitigation is not the type of factual determination entitled to deference under the AEDPA as set forth in § 2254(e)(1). Styers' argument should be summarily rejected because, contrary to this Court's jurisprudence, the Ninth Circuit failed to give any deference to the Arizona court's findings or legal analysis.

The Arizona Supreme Court's finding that it had considered all proffered mitigation evidence and that the proffered evidence was not sufficiently substantial to call for leniency, are

the type of findings that are entitled to deference under 28 U.S.C. § 2254(e)(1).

The Arizona Supreme Court conducted a reweighing pursuant to *Clemons v. Mississippi*, 494 U.S. 738 (1990), and its statutory duty to independently review Styers' death sentence. A.R.S. § 13–703. Pursuant to state statute, the Arizona Supreme Court was required to "reweigh" based on its independent review of the aggravation and mitigation evidence presented. *See* A.R.S. § 13–703.01(A); *State v. Lee*, 189 Ariz. 608, 617–18, 944 P.2d 1222, 1231–32 (1997) (noting that in death sentence appeals, after independent review of aggravation and mitigation, the court "weigh[s] the aggravating and mitigating circumstances.") The statute explicitly provides that, to the extent the court "determines that an error was made regarding a finding of aggravation or mitigation, the supreme court shall independently determine if the mitigation the supreme court finds is sufficiently substantial to warrant leniency in light of the existing aggravation." A.R.S. § 13–703.01(B). Thus, in its reweighing capacity, the Arizona court necessarily made those findings regarding those "basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators . . . .'" that are entitled to a presumption of correctness under § 2254(e)(1). *Thompson v. Keohane*, 516 U.S. 99, 110 (1995) (quoting *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963)

(quoting in turn *Brown v. Allen*, 344 U.S. 443, 506 (1953))).

The Arizona Supreme Court was obligated to reweigh and make a determination as to whether all of Styers' proffered mitigation evidence was sufficiently substantial to warrant leniency. The state court did so, and its findings are entitled to deference. The Ninth Circuit clearly misconstrued the state court's explicit statement that it had considered all of Styers' proffered mitigation evidence.

In *Schriro v. Landrigan*, 550 U.S. 465 (2007), this Court found that an en banc panel of the Ninth Circuit erred by failing to accept a state court's factual finding that the defendant waived presentation of mitigation. This Court found that the state court reasonably determined that Landrigan's plain statements explicitly informing his counsel not to present mitigation evidence demonstrated that Landrigan had waived presentation of mitigation. *Id.* at 476. Here, the Ninth Circuit's error is even more apparent. Unlike *Landrigan*, where the state court factual determination measured what was in the Defendant's mind at the sentencing hearing, in this case, the state court factual determination measured what was in the minds of the state court judges making the decision.

Under 28 U.S.C. § 2254, federal courts on collateral review must defer to factual findings

of the state courts unless those findings are objectively unreasonable. The Ninth Circuit erred by misconstruing the plain statements of the Arizona Supreme Court that it considered all of Styers' proffered mitigation evidence.

Even without the deference required under the AEDPA, the Ninth Circuit clearly erred in rejecting the state court's factual findings. The Ninth Circuit failed to presume that the Arizona Supreme Court had considered all of Styers' mitigation evidence when it explicitly stated that it had done so. *Parker v. Dugger*, 498 U.S. 308, 314 (1991) ("We must assume that the trial judge considered all this evidence before passing sentence. For one thing, he said he did.") In its opinion affirming Styers' death sentence, the Arizona Supreme Court twice stated it had considered all of Styers' proffered mitigation:

> Because the trial court did not list each of the proffered items of claimed mitigation and state that it found them unavailing does not mean that the trial court did not consider them. It is apparent that the trial court considered this evidence, but ultimately found that it was not sufficiently substantial to call for leniency. *We will also consider it in our independent review.*
>
> . . .

> We have *considered* all of the proffered mitigation and, like the trial court, find it is not sufficiently substantial to warrant leniency.

177 Ariz. at 117, 865 P.2d at 778. (Emphasis added.)

The Ninth Circuit failed to give any deference to the fact that the Arizona court considered Styers' mitigation evidence as required by *Parker*. The Ninth Circuit's ruling directly conflicts with *Parker* and should be reversed.

II

THE NINTH CIRCUIT'S ANALYSIS MISAPPLIES *SMITH v. TEXAS*, AND DIRECTLY CONFLICTS WITH RULINGS OF THE ARIZONA SUPREME COURT WITH REGARD TO ARIZONA'S CAPITAL SENTENCING JURISPRUDENCE.

The Arizona Supreme Court's finding that Styers' proffered Post-Traumatic Stress Disorder mitigation evidence was not relevant because of a lack of causal nexus does not mean that the state court failed to *consider* proffered mitigation and is not contrary to this Court's

holdings in *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Smith v. Texas*, 543 U.S. 37 (2004). Styers misapplies the holdings in these cases in arguing that the Arizona Supreme Court requires capital defendants to prove a causal nexus before mitigation evidence is considered. He argues that, prior to *Smith*, Arizona required an unconstitutional "nexus-to-the-crime" screening test. This is an incorrect interpretation of Arizona's capital sentencing jurisprudence—post-*Lockett*, Arizona has never screened relevant mitigation evidence by requiring a nexus between the evidence and the crime—the causal nexus test is simply a method to analyze the relevance of mitigating circumstances.

In *Lockett*, this Court found an Ohio statute which limited the range of mitigating circumstances which may be considered by the sentencer in a capital case violated the Eighth Amendment. 438 U.S. at 608. Specifically, this Court held that "[T]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigation factors." *Id.*

Seventeen days after this Court's decision in *Lockett*, the Arizona Supreme Court, following *Lockett*, found Arizona's capital sentencing statute unconstitutional because it limited the consideration of relevant mitigation evidence. *State v. Watson*, 586 P.2d 1253, 1257 (1978).

The court found that a portion of Arizona's statute, then A.R.S. § 13–454(F), unconstitutionally limited the consideration of mitigating circumstances to only those contained in the statute. *Id.* at 1256–57.

After *Watson*, Arizona courts have never limited the presentation or consideration of relevant mitigating circumstances in capital sentencing proceedings. *See* A.R.S. § 13–703; *State v. Gretzler*, 659 P.2d 1, 13 (1983) (finding Arizona's capital sentencing statute similar to statutes upheld in *Gregg v. Georgia* and *Proffitt v. Florida*, and requiring courts to consider all relevant mitigating circumstances). (Citations omitted.) Moreover, as the state court recognized, Arizona law has never barred a capital defendant from presenting any evidence of mitigation. *Watson*, 586 P.2d at 1257.

Similarly, contrary to Styers' contention, the Arizona Supreme Court has always followed this Court's holding in *Eddings* requiring the consideration of all proffered mitigation evidence in capital sentencing proceedings. *See State v. Valencia*, 645 P.2d 239, 241 (1982) (citing *Eddings* in requiring consideration of age as a relevant mitigating factor); *State v. McMurtrey*, 664 P.2d 637, 645–46 (1983) (holding that the sentencer may not refuse to consider, as a matter of law, relevant evidence presented in mitigation).

Styers' argument that the Arizona Supreme

Court placed an unconstitutional causal nexus screening test in refusing to consider mitigating evidence in *State v. Hoskins*, 14 P.3d 997 (2000), is misplaced. In *Hoskins*, the state court found that proffered evidence of mental impairment or family dysfunction would not be relevant unless there was a connection between the mitigating circumstances and the crime. *Id.* at 1021–22. The court never refused to consider the mitigating circumstances in violation of *Eddings*. The court in *Hoskins* simply found that the mitigation evidence was not relevant—it did not fail to consider the evidence.

This Court has never held that a sentencer is required to find particular mitigation evidence relevant. *See Harris v. Alabama*, 513 U.S. 504, 512 (1995) ("Equally settled is the corollary that the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer.") (citing *Blystone v. Pennsylvania*, 494 U.S. 299, 306–07 (1990); *Eddings*, 455 U.S. at 113–15.) Moreover, this Court has rejected the notion that the Constitution requires States to adhere to a particular method of balancing mitigating and aggravating factors in capital sentencing proceedings. *Harris*, 513 U.S. at 512 (citing *Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988)). The Arizona court's use of a causal nexus in analyzing the weight to be given mitigating circumstances is not unconstitutional. The use of a causal nexus analysis does not bar the

consideration of mitigating circumstances—it is simply a logical method of analyzing the relevance or weight to be given particular mitigating circumstances.

In misapplying *Smith* to this case, the Ninth Circuit wrongly set forth a rule that would require Arizona courts to give specific mitigating weight to irrelevant mitigation evidence proffered by a capital defendant. This is in direct conflict with this Court's holding in *Franklin v. Lynaugh*, finding that the Constitution does not require the States to follow a particular method for balancing aggravation and mitigation. *Smith* provides that the sentencer in a capital sentencing proceeding cannot be barred from considering proffered mitigating circumstances. This Court has never held, however, that the sentencer is obligated to find all proffered mitigation relevant. *See Harris*, 513 U.S. at 512.

The Ninth Circuit's misapplication of *Smith*, left unchanged, will affect every Arizona capital case in which the sentencer considers, but gives diminished weight to, proffered mitigation that has no causal connection to the crime. Review by this Court is imperative to resolve the conflict between the Ninth Circuit and the Arizona Supreme Court regarding Arizona's procedure for analyzing mitigating circumstances in capital sentencing proceedings.

CONCLUSION

For these reasons, Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

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IN THE

Supreme Court of the United States

DORA B. SCHRIRO, Director,
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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the Antiterrorism and Effective Death Penalty Act (AEDPA), when a State's highest court explicitly states it has considered proffered mitigation evidence, must a habeas reviewing court accept that statement, absent clear and convincing evidence to the contrary?

2. Did the Ninth Circuit violate this Court's jurisprudence by holding that *Eddings* v. *Oklahoma* and *Smith* v. *Texas* forbid a sentencer from relying on the absence of a causal nexus between an alleged mental condition and the crime committed in deciding how much weight to give the proffered mitigation evidence?

3. Was the *Lockett-Eddings-Penry* line of cases wrongly decided and should it be overruled?

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IN THE

Supreme Court of the United States

DORA B. SCHRIRO, Director,
Arizona Department of Corrections,
Petitioner,

vs.

JAMES LYNN STYERS,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to represent the interests of victims of crime and the law-abiding public in the criminal justice system. This case involves one of the most troublesome issues in criminal law, the rule of *Lockett* v. *Ohio* and its progeny. The delay,

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1. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

expense, and injustice caused by this rule are contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The facts are taken from the opinion of the Arizona Supreme Court on direct appeal, *State* v. *Styers*, 177 Ariz. 104, 865 P. 2d 765 (1993). In December 1989, "Defendant James Styers and his two-year-old daughter shared an apartment with co-defendant Debra Milke and her four-year-old son, Christopher." *Id.*, at 108, 865 P. 2d, at 769. On December 2, defendant took Christopher out with him, supposedly going to a shopping mall to see Santa Claus. *Ibid.* Defendant picked up a friend, Roger Scott. Then they took little Christopher out to the desert and shot him three times in the back of the head. *Ibid.*

Defendant was convicted of first-degree murder (both premeditated and felony murder), conspiring with Milke and Scott to commit the murder, child abuse, and kidnapping. *Id.*, at 109, and n. 1, 865 P. 2d, at 770, and n. 1. "The trial court found three statutory aggravating factors: (1) defendant was an adult and the victim was under age 15, A. R. S. § 13-703(F)(9); (2) the murder was committed in expectation of pecuniary gain, A. R. S. § 13-703(F)(5); and (3) the murder was committed in an especially heinous and depraved manner, A. R. S. § 13-703(F)(6)." *Id.*, at 114-115, 865 P. 2d, at 775-776[2]. The trial court further found "no mitigating

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2. At the time of the trial and direct appeal, the factors that made the defendant eligible for the death penalty were found by the trial court in Arizona, and this Court had upheld this system against a challenge that it violated the Sixth Amendment right to jury trial. See *Walton* v. *Arizona*, 497 U. S. 639, 649 (1990). The subsequent, contrary decision of *Ring* v. *Arizona*, 536 U. S.

factors sufficiently substantial to call for leniency, and imposed the death penalty." *Id.*, at 109, 865 P. 2d, at 770.

The pecuniary gain factor was based on a theory that Milke wanted Christopher killed to collect a $5000 insurance policy and that defendant expected a share of the proceeds. The Arizona Supreme Court found that this factor was not proved beyond a reasonable doubt. *Id.*, at 115, 865 P. 2d, at 776.

The Arizona Supreme Court independently reviews the balance of aggravating and mitigating factors as a matter of state law. See *id.*, at 117, 865 P. 2d, at 778. As a matter of federal law, the stricken aggravating circumstance also required either a reweighing of the aggravating and mitigating factors or a remand to the trial court for resentencing. See *Richmond* v. *Lewis*, 506 U. S. 40, 48 (1992). As the Arizona Supreme Court explained in its decision in co-defendant Milke's case, decided the same day, reweighing by the appellate court is indicated when "[t]here is no new evidence to be received and no evidence was improperly excluded at the sentencing hearing." *State* v. *Milke*, 177 Ariz. 118, 128, 865 P. 2d 779, 789 (1993). The state court reviewed Styers' proffered mitigation:

> "Defendant had no prior convictions for either misdemeanors or felony offense. This is relevant mitigating evidence. [Citation.] Defendant's service in Vietnam and honorable discharge are also relevant mitigating circumstances. [Citation.] Defendant also suffered from post-traumatic stress disorder prior to and around the time of the murder as a result of his combat service in Vietnam. This could

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584 (2002), is not retroactive to cases that became final on direct review prior to *Ring*. See *Schriro* v. *Summerlin*, 542 U. S. 348, 358 (2004).

also, in an appropriate case, constitute mitigation. See *State* v. *Bilke*, 162 Ariz. 51, 53, 781 P. 2d 28, 30 (1989) (finding evidence of post-traumatic stress disorder constituted newly discovered evidence that may have affected sentencing). However, two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the conspiracy and the murder.

"There was testimony that defendant cared for Christopher at times, but his actions and participation in his murder speak volumes to that. Finally, giving a felony murder instruction 'is not relevant "where the defendant intended to kill the victim or where the defendant knew with substantial certainty that his conduct would cause death." ' [Citations.] The defendant conspired to kill Christopher and then he killed him. The fact that the court gave a felony murder instruction is not mitigating here." *Styers*, 177 Ariz., at 116-117, 865 P. 2d, at 777-778.

Following state collateral review, Styers sought federal habeas relief. The District Court denied the petition but granted a certificate of appealability solely on his ineffective assistance claim. See *Styers* v. *Schriro*, 547 F. 3d 1026, 1028 (CA9 2008). The Court of Appeals expanded the certificate of appealability to include the aggravating circumstance and reweighing issues. See *ibid*. That court then found that the passage quoted above constitutes a violation of the rule of *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), by refusing to consider as mitigating a mental condition with no connection to the crime. See *Styers*, 547 F. 3d, at 1035.

SUMMARY OF ARGUMENT

As described in the petition for certiorari, the Court of Appeals in this case misapplied the rule of *Lockett* v. *Ohio* and its progeny. The Court of Appeals confused the exclusion from consideration of a factor proffered as mitigating, which would be *Lockett* error, with the decision of the state court, in its capacity as independent re-evaluator of the evidence, that the evidence was simply not mitigating. The latter is perfectly proper. The decision of the Court of Appeals could be summarily reversed on that basis.

Amicus CJLF suggests, however, that this case presents an opportunity to straighten out one of the most troublesome and longest-standing anomalies in this Court's criminal jurisprudence: the "tension" between the *Lockett* rule and the principles underlying *Furman* v. *Georgia*. Pure *Lockett* questions rarely arise anymore since the states conformed their statutes to *Lockett*, and the old cases have worked their way out of the system. The opportunity presented by this case should not be lost.

The sweeping rule of *Lockett* deprived the people of the states of the authority to decide on a uniform, statewide basis which factors will be considered mitigating in a capital case. Such a diminution of the people's right of self-government requires a strong justification. The justification was weak in 1978, and it is even weaker today.

Complying with the *Lockett* rule is expensive. Defense counsel are expected to conduct exhaustive investigations of the defendant's entire life, and judgments may be reversed for ineffective assistance if they do not. This heavy constitutional tax on justice is an excessive burden, particularly when there is no basis for it in the Constitution.

One issue that everyone can agree on is that the delay in reviewing capital cases is a travesty. Litigation over the effectiveness of counsel in presenting evidence having nothing to do with the crime is a large part of that delay. If states could declare that evidence to be irrelevant and inadmissible, this portion of the expense and delay would vanish.

Requiring states to allow "mitigating" factors that most jurors do not consider mitigating does not add to the reliability and consistency of capital verdicts, but just the opposite. Allowing each juror to decide what is mitigating increases the chances of idiosyncratic verdicts.

The *Lockett* rule was initially a useful catalyst to force legislatures to amend statutes they had enacted on the reasonable but mistaken view that *Furman* required them to restrict mitigation to a greater degree than they would have chosen on their own. The need for that catalyst is long gone. The legal landscape is also far different today than it was in 1978 because of the multiple categorical exclusions this Court has created since then. Minor accomplices swept up in the felony-murder rule, persons under 18 at the time of the crime, and mentally retarded people are all exempt. Defendants today in cases with the same facts as the *Lockett*, *Eddings*, or *Penry* cases would not be facing the death penalty at all.

The primary problem is evidence that goes only to the background of the defendant and has no direct bearing on the crime, such as the evidence in the present case. Most jurors consider such evidence to be not mitigating at all or only weakly mitigating. States should be allowed to decide that the very limited value of this evidence is not worth the costs in money, delay, and uneven application.

ARGUMENT

I. This case presents an uncommon opportunity to reconsider the *Lockett* rule.

In 1978, a plurality of this Court handed down an edict of breathtaking sweep. Almost two centuries after its enactment, the Eighth Amendment suddenly stripped the people of the states of the power to decide what factors would be considered mitigating in a capital case. See *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978). Instead of deciding what is mitigating on a statewide basis, applicable equally to all capital defendants, that question had to be decided case-by-case by each jury, or, as we found out later, by each juror. See *Mills* v. *Maryland*, 486 U. S. 367, 384 (1988).

This proposition was not initially joined by a majority of the Court. Justice White, while concurring in the judgment, warned that the Court was undoing what it had accomplished in *Furman* v. *Georgia*, 408 U. S. 238 (1972). See *Lockett*, 438 U. S., at 622-623. In subsequent years, other Members of this Court have come to the same conclusion. See *Walton* v. *Arizona*, 497 U. S. 639, 661 (1990) (Scalia, J., concurring); *Graham* v. *Collins*, 506 U. S. 461, 492 (1993) (Thomas, J., concurring).

Pure *Lockett* issues are uncommon now, because the states with capital punishment changed their laws to conform to *Lockett*'s mandate, either by legislative amendment or by broadly construing mitigating circumstances that could be read more narrowly. See *People* v. *Easley*, 34 Cal. 3d 858, 878, n. 10, 671 P. 2d 813, 826, n. 10 (1983). Even so, the cloud of *Lockett* continues to loom over the law of capital punishment. The requirement that the sentencer consider *everything* the defense throws against the wall, including circumstances that most people would consider aggravating,

see *Graham*, 506 U. S., at 500 (sociopathy), usually presents itself today in claims that defense counsel did not adequately discover and present the mitigation. See, *e.g.*, *Bell* v. *Kelly*, 260 Fed. Appx. 599, 605-606 (CA4 2008), cert. dismissed as improvidently granted, 555 U. S. __, 129 S. Ct. 393, 172 L. Ed. 2d 353 (2008). These cases are inappropriate vehicles for addressing the underlying *Lockett* question, because the defendant is entitled to a lawyer who adequately presents the mitigation the legislature has allowed, whether the legislature was truly constitutionally required to allow that mitigation or not.

This case presents a *Lockett* question because the Arizona Supreme Court was acting in a dual capacity of deciding the law and independently reweighing the circumstances. If the court decided in its law-deciding capacity that a particular item of proffered mitigation could not be considered, that would be *Lockett* error supposedly in violation of the Eighth Amendment. On the other hand, if the court decided in its circumstance-weighing capacity that the proffered factor was simply not mitigating, that would be perfectly proper. See Pet. for Cert. 15-16. The fact that the same decision could be considered either a violation of the nation's fundamental law or a completely legitimate judgment, with the distinction turning on a minor difference in the phrasing of the opinion, is itself evidence that something is seriously wrong.

What is wrong is *Lockett* itself. It is high time to reconsider whether the Eighth Amendment really does strip the people of the legislative authority to specify what will be considered mitigating in capital cases, an authority they have beyond question in noncapital cases.

II. The *Lockett* rule erroneously removes to the federal judiciary a decision that properly belongs to the people of the several states.

Beyond question, the legislative power of the state included the authority to decide what factors would be considered in mitigation of punishment, including capital punishment, at the time of the American Revolution. At common law, all felonies were capital except as mitigated by the "benefit of clergy," and that mechanism was subject to legislative control. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Ring* v. *Arizona*, No. 01-488, pp. 3-8 (tracing history).

> "When the American people created a national legislature with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states. These powers proceed not from the people of America, but from the people of the several states, and remain, after the adoption of the constitution, what they were before except so far as they may be abridged by that instrument." *Sturges* v. *Crowninshield*, 4 Wheat. (17 U. S.) 122, 193 (1819).

If the people of the states had a legislative power initially, and they have not yielded it by the ratification of the Constitution or any of its amendments, then they still have it.

At what point did the people of the states give up the power to decide what factors would be considered mitigating in capital cases? Certainly not when they ratified the Eighth Amendment or the Fourteenth Amendment. The legislative power to prescribe death as a punishment for a crime without regard to any mitigating circumstances was well established in 1791 and in 1868, and neither amendment was thought at the time of its adoption to abrogate such laws, which

continued in force in many jurisdictions until the late nineteenth century. See *McGautha* v. *California*, 402 U. S. 183, 200, and n. 11 (1971).

Furman v. *Georgia*, 408 U. S. 238 (1972), held that there was a constitutional limit to the states' authority to structure the capital sentencing system. This limit was held to have been exceeded by a system so unstructured as to be arbitrary, with a suspicion lurking in the background that the arbitrariness fostered discrimination against black defendants. See *Graham* v. *Collins*, 506 U. S. 461, 479-484 (1993) (Thomas, J., concurring); *id.*, at 500-501 (Stevens, J., dissenting). This limit was found in the Eighth Amendment, though it would have been better placed in the Equal Protection Clause. See *id.*, at 488 (Thomas, J., concurring) (Eighth Amendment should be limited to substance, not procedure).

Four years later, in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), another bookend was announced, limiting legislative authority in capital sentencing on the other end. Too much structure, *i.e.*, mandatory sentencing, was also deemed unconstitutional, even though it was the norm throughout the United States at the time of the adoption of both the Eighth and Fourteenth Amendments.

The lead opinion gave three reasons for wresting this authority from the people. First, a mandatory death penalty was said to be incompatible with contemporary values, looking to legislative enactments as the primary indication of values, see *Woodson*, 428 U. S., at 294-295, and secondarily to the fact that juries with discretion did not impose death in most cases. See *id.*, at 295-296. Second, a death penalty that is mandatory in theory despite circumstances that make a powerful case for mercy will be discretionary and arbitrary in practice, as juries engage in nullification without

guidance on how to do so and indeed contrary to their instructions and oaths. See *id.*, at 302-303.

The third, and by far weakest, reason was that "fundamental respect for humanity . . . requires consideration of the character and record of the individual offender . . . ." See *Woodson*, 428 U. S., at 304. This proposition is supported by very little beyond a simple *ipse dixit*. As part of its thin justification for this ground, the *Woodson* lead opinion returned to the assertion of "the need for reliability in the determination that death is the appropriate punishment . . . ." *Id.*, at 305. That need supports considering circumstances for which there is a broad consensus of strong mitigation, but it provides no support for a mandatory consideration of factors that most jurors would consider weak, irrelevant, or even aggravating.

In *Lockett*, the Court was confronted with a post-*Furman*, pre-*Woodson* statute that was essentially mandatory, allowing a sentence less than death only under three specific and uncommon circumstances. See *Lockett* v. *Ohio*, 438 U. S. 586, 607 (1978). No more than a modest extension of *Woodson* was needed to declare this statute unconstitutional. Instead, the plurality opinion announced the sweeping edict

> "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 604 (emphasis in original, footnote omitted).

Woodson's rationale of avoiding arbitrary nullification would have supported a requirement to consider those factors widely regarded as powerfully mitigating,

but the *Lockett* plurality went vastly farther. Why should a state be required to submit to a jury a factor that only a few jurors would consider mitigating, so that its consideration as such depends on the semi-random draw of jurors and not the consensus of the people of the state? Is that not contrary to at least the spirit of *Furman*, if not the letter?

The *Lockett* plurality apparently believed that going through factors one by one would take too long and introduce too much uncertainty in the law. "The States now deserve the clearest guidance this Court can provide . . . ." 438 U. S., at 602. To say that the *Lockett* decision did not achieve this goal would be an understatement. *Lockett* subsequently was employed to invalidate numerous capital judgments in a state where a standard instruction had been crafted by the state bar, approved by the highest court, and written into the rules in the sincere and justified belief that it was in compliance with this Court's precedents. See *Mills* v. *State*, 310 Md. 33, 67, 527 A. 2d 3, 19 (1987) (noting that sentencing form was prescribed in a rule adopted by state high court), rev'd *sub nom.*, *Mills* v. *Maryland*, 486 U. S. 367 (1988). It was used to invalidate a host of judgments in a state where both the state and federal courts believed that the statute had been expressly approved by this Court in *Jurek* v. *Texas*, 428 U. S. 262 (1976). See *Penry* v. *Lynaugh*, 492 U. S. 302, 352-353 (1989) (Scalia, J., dissenting in part). In case after case after case, justice was denied as the *Lockett* cancer continued to metastasize and overturn judgments entered after the state did what they sincerely and justifiably believed *Furman* required them to do.

To take away from the people the authority to decide a question of policy previously within their control is a grave step, never to be taken lightly. To maintain such a removal also requires justification. As

explained in Part IV, the practical justifications that once existed for the *Lockett* rule are gone. On the other hand, as explained in Part III, the practical costs of the *Lockett* rule are huge and growing. It is time to restore to the people the authority that was wrongly taken from them.

III. The *Lockett* rule causes continuing harm in terms of cost, delay, and uneven application of the death penalty.

A. Cost.

A constitutional precedent, even if wrongly decided as an initial matter, may be protected from overruling by the doctrine of *stare decisis* if it has become part of the fabric of the law and if its practical effects are no worse than the alternative. See *Dickerson* v. *United States*, 530 U. S. 428, 443-444 (2000). The latter requirement is definitely not met in the case of the *Lockett* rule. The rule that *Lockett* has become, in conjunction with the right to effective assistance of counsel, now imposes an enormous constitutional tax on justice in the very worst criminal cases.

At the time that the *Lockett* rule was accepted by this Court in a majority opinion, the penalty phase of capital trials was still a relatively brief and straightforward proceeding. The case in mitigation at issue in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), consisted of only four witnesses. See *Eddings* v. *State*, 616 P. 2d 1159, 1169 (Okla. Crim. App. 1980). Today, California finds it necessary to have a rule for cases where the transcripts exceed 10,000 pages. See Cal. Rules of Ct. 8.630(c)(1)(C).

Solid data on the cost of the death penalty are not available at this time. A feasibility study by RAND

Corporation found that the cost of a study of costs, done right, would be large and exceeded the available resources. See S. Everingham, Investigating the Costs of the Death Penalty in California: Insights for Future Data Collection from a Preliminary RAND Effort 1 (2008), available at http://www.rand.org/pubs/testimonies/2008/RAND_CT300.pdf (viewed May 19, 2009). The available data consist to a large extent of reports of organizations with an anti-death-penalty agenda, reports that must be read with considerable skepticism. See, *e.g.*, N. Minsker, The Hidden Death Tax: The Secret Costs of Seeking Execution in California (2008) ("ACLU Report"); J. Roman, *et al.*, The Cost of the Death Penalty in Maryland (2008) ("Urban Institute Report"). In the same category are reports of commissions established by elected officials opposed to the death penalty, stacked with a membership tilted that direction. See, *e.g.*, California Commission on the Fair Administration of Justice, Report and Recommendations on the Administration of the Death Penalty in California (2008); New Jersey Death Penalty Study Commission Report (2007).

Even reading these reports with the appropriate degree of skepticism, though, the picture emerges that the death penalty *as it presently exists* carries a high financial cost, that cost is higher than it needs to be, and the *Lockett* rule is a very large part of the reason.

> "About 70% of the added cost of a death notice case occurs during the trial phase. These additional costs are due to a longer pre-trial period, a longer and more intensive voir dire process, longer trials, more time spent by more attorneys preparing cases, and an expensive penalty phase trial that does not occur at all in non-death penalty cases." Urban Institute Report, *supra*, at 2.

The additional penalty phase trial and the additional preparation for it are for evidence that would not be admissible in the guilt phase. But the jury already knows the circumstances of the crime from the guilt phase. The additional evidence is largely "background" evidence that the states are forced to admit by the *Lockett* rule.

In testimony to the California Commission on the Fair Administration of Justice (CCAJ), Greg Fisher of the Los Angeles County Public Defender's Office described the additional preparation burden:

> "That means investigating the life history of the client. That means putting together a comprehensive multigenerational social history. According to the mandate of the U.S. Supreme Court in cases such as *Wiggins* and *Rompilla*, we are mandated to find every fact in mitigation that may be out there. Now that's a pretty tall task, and in order to do that you have to devote a lot of resources."[3]

Although we cannot assign a number, it is clear that the *Lockett* rule imposes a heavy constitutional tax on the death penalty. Cf. *Blakely* v. *Washington*, 542 U. S. 296, 318 (2004). Such a tax might be a burden that states choosing to have the death penalty would have to bear if the Constitution really required the rule, but it does not. See Part II, *supra*. For this Court to maintain such a heavy burden on justice would require a compelling justification, but there is none.

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3. The full February 20, 2008 hearing of the CCAJ is available as a video file at http://www.ccfaj.org/rr-deathpenalty.html. Unfortunately, there is no transcript, only a summary at http://www.ccfaj.org/documents/reports/dp/expert/LAPublicHearingMinutes.pdf. The statement quoted above occurs at about 2:47:15 in the video file.

B. Delay.

The financial cost of the *Lockett* rule, heavy as it is, is not the only cost. The length of time from sentence to execution, even in cases of unquestioned guilt, is a travesty. Thirteen years after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, we still do not have an effective death penalty. This delay is contrary to the rights of victims. See 18 U. S. C. §§ 3771(a)(7), (b)(2)(A). It diminishes the deterrent effect of the death penalty and thereby costs innocent lives. See Shephard, Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment, 33 J. Legal Studies 283 (2004). There is even an argument that it may violate the rights of the defendant by being a cruel punishment. See *Lackey* v. *Texas*, 514 U. S. 1045, 1045-1047 (1995) (Stevens, J., respecting denial of certiorari); *Knight* v. *Florida*, 528 U. S. 990, 993 (1999) (Breyer, J., dissenting from denial of certiorari). A principal cause of the delay is "this Court's Byzantine death penalty jurisprudence," *Knight*, *supra*, at 991 (Thomas, J., concurring), and the *Lockett* line of cases is the prime example. See *ibid.*; see also *supra*, at 12.

Although cases directly presenting *Lockett* issues are a rare and possibly vanishing breed, as explained in Part I, *supra*, the *Lockett* rule nonetheless lies at the root of a large portion of capital case review. One need only look at this Court's capital cases where the defendant claims ineffective assistance of counsel to see the problem. The ineffectiveness claimed rarely has anything to do with the crime. In case after case, defendants assail their trial counsel for not having dug up and presented "background" evidence. See *Williams* v. *Taylor*, 529 U. S. 362, 370-371 (2000); *Wiggins* v. *Smith*, 539 U. S. 510, 516-517 (2003); *Rompilla* v. *Beard*, 545 U. S. 374, 379-380 (2005); *Bell* v. *Kelly*, 260

Fed. Appx. 599, 605-606 (CA4 2008), cert. dismissed as improvidently granted, 555 U. S. __, 129 S. Ct. 393, 172 L. Ed. 2d 353 (2008); *Kindler* v. *Horn*, 542 F. 3d 70, 83-85 (CA3 2008), cert. granted *sub nom.*, *Beard* v. *Kindler*, No. 08-992 (May 18, 2009). If states could declare "background" evidence irrelevant and inadmissible, this large source of delay would vanish.

C. "Tension" with Furman.

Opponents of the *Lockett* rule and its extensions have long asserted that the rule is contrary to *Furman* v. *Georgia*, 408 U. S. 238 (1972). See *supra*, at 9-9; see also *Kennedy* v. *Louisiana*, 554 U. S. __, 128 S. Ct. 2641, 2659, 171 L. Ed. 2d 525, 549 (2008). That is an overstatement. Even as hampered by *Lockett*, the post-*Furman* reforms have achieved the basic goal. Numerous studies, including those sponsored by opponents of the death penalty, have found that race of the defendant has no detectable effect on the outcome of capital sentencing. See Scheidegger, Smoke and Mirrors on Race and the Death Penalty, 4 Engage (2), 42, 42-44 (Oct. 2003), available at http://www.fed-soc.org/publications/pubID.624/pub_detail.asp (summarizing studies). When properly analyzed, the same studies refute the claim that race of the victim is a major factor. See *id.*, at 44. The Baldus study at issue in *McCleskey* v. *Kemp*, 481 U. S. 279 (1987), "identified a class of clearly aggravated cases where the death penalty was consistently imposed, a class of clearly mitigated cases where it was almost never imposed, and a mid-range where it was sometimes imposed, exactly the way a discretionary system should work." Scheidegger, *supra*, at 42 (footnote omitted).

The "rules that ensure consistency in determining who receives a death sentence," *Kennedy*, 128 S. Ct., at 2658, 171 L. Ed. 2d, at 549, have been a qualified

success, and the consistency is well within constitutional limits. That does not mean, however, that we cannot do better. Capital sentencing can be made more consistent than it is at present by enabling the states to provide more guidance to the sentencer. The original concept of the post-*Furman* reforms was to channel the sentencer's discretion. To be a channel and not a dike, the structure should have *two* banks. While this Court has required that aggravating factors have a " 'common-sense core of meaning . . . that criminal juries should be capable of understanding,' " *Tuilaepa* v. *California*, 512 U. S. 967, 975 (1994) (quoting *Jurek* v. *Texas*, 428 U. S. 262, 279 (1976) (White, J., concurring in judgment)), it has simultaneously forbidden the states to impose a similar requirement on the mitigating circumstances. The Court has noted the "tension" between *Lockett* and *Furman* and that the combination "has produced results not [altogether] satisfactory." *Kennedy*, 128 S. Ct., at 2659, 171 L. Ed. 2d, at 549.

The tension is unnecessary, because the *Lockett* rule is unnecessary. As we will discuss in the next part, *Lockett* did serve a useful function in 1978, but the need for it is long gone.

IV. There is little or no current need for the *Lockett* rule.

A. The Corrective Catalyst of 1978.

In *Lockett*, this Court was presented with a problem of its own making. The Ohio Legislature had enacted the severe restrictions on the kind of mitigation that would be considered not because it wanted to, but because it very reasonably concluded that it had to in order to comply with *Furman*. See *Lockett* v. *Ohio*, 438 U. S. 586, 599-600, nn. 7-8 (1978). Even though the Court's approval of the Georgia system in *Gregg* v.

Georgia, 428 U. S. 153 (1976), made very clear that such restriction was not necessary, legislative inertia left these laws on the books.

By requiring the states to remove their restrictions on mitigation, *Lockett* served a useful catalytic function. There is no longer any capital sentencing statute in any state that restricts mitigation in the way the pre-*Lockett* statutes did. The last such restriction was removed legislatively in 1991. See *Smith* v. *Texas*, 543 U. S. 37, 39 (2004) (discussing Texas legislation in response to *Penry*). If *Lockett* were overruled on terms making it clear that the policy choice is once again in the hands of the people's representatives, any restriction enacted by a legislature would be based on a legislative determination that not allowing a particular type of mitigation is unhelpful to achieving a just result, not worth the expense, or both. Any decision by a state court that a particular type of evidence need not be considered would be based on that court's interpretation of a broad statute, and it would necessarily be limited to evidence on the fringe of relevance, such as the evidence in the present case. The need for the catalyst is long gone.

B. Categorical Exclusions.

Sandra Lockett, Monty Eddings, and John Penry have two things in common. First, the decisions of this Court in their cases established and expanded the rules regarding the unlimited consideration of mitigating evidence in the discretionary capital sentencing decision. Second, on the actual or assumed facts of their cases, none of them would need this rule if they were retried today. All three would be eligible for a categorical exclusion from the death penalty. Lockett would be excluded under the rule of *Enmund* v. *Florida*, 458 U. S. 782, 797 (1982), a rule similar to the one Justice White would have made in her case. See *Lockett*, 438

U. S., at 624. Eddings, who was 16 at the time of the crime, would be exempt under the rule of *Roper* v. *Simmons*, 543 U. S. 551, 578 (2005). If Penry actually were retarded, he would be exempt under the rule of *Atkins* v. *Virginia*, 536 U. S. 304, 321 (2002). But see *Penry* v. *State*, 178 S. W. 3d 782, 785 (Tex. Crim. App. 2005) (he is not).

This is more than coincidence. By creating these categorical exclusions, this Court has carved out the cases with the strongest mitigation and excluded them from capital punishment altogether. The danger that any legislatively enacted capital sentencing system would exclude a case of compelling mitigation is far less than it was in 1978 because of the categorical exclusion of the most compelling cases.

C. Realistic Restrictions.

If we are to consider the possibility that the states may once again place limitations on what kinds of evidence may be considered mitigating in capital cases, we should ask what kinds of restrictions are likely to appear. Is any legislature in this country going to enact a statute that an 18-year-old's youth may not be considered in mitigation at all, even though he would be categorically exempt if he were a day younger? Of course not. Similarly, no legislature and no court is going to forbid consideration of developmental disability less than retardation, of the "nontriggerman" status of a mere accomplice, or of psychotic disorders that do not reach the threshold for negating guilt. Cf. 18 U. S. C. § 17 (codifying *M'Naughten* standard).

On the other hand, a legislature would be entirely reasonable in declaring that being a sociopath is not mitigating. See *Graham* v. *Collins*, 506 U. S. 461, 500 (1993) (Thomas, J., concurring). Whether voluntary intoxication is mitigating is a matter that ought to be

within the legislative competence to decide. See *Montana* v. *Egelhoff*, 518 U. S. 37, 58-60 (1996) (Ginsburg, J., concurring in the judgment).

Most importantly for the cost aspect of the death penalty, state legislatures should be allowed to decide whether they will continue to allow the evidence of the defendant's entire life story that presently is claimed to require massive investigations and astronomical expense. Research indicates that a majority of jurors do not consider such evidence mitigating *at all*. Of those who do, a majority of those who do consider it only slightly mitigating. See Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 Colum. L. Rev. 1538, 1571 (1998).[4] Evidence that provokes idiosyncratic responses based more on the jurors' beliefs and attitudes than on the defendant's culpability is the kind of evidence that produces the greatest tension with the consistency goals of *Furman* and does the least to advance the cause of determining the appropriate sentence for the crime. A legislature should be permitted to decide that, on the whole, this kind of mitigation evidence does more harm than good and ought not be allowed.

For all these reasons, the *Lockett* rule is long overdue for reconsideration. *Amicus* CJLF therefore respectfully requests that the Court grant the petition in this case and consider whether the rule of *Lockett* and its progeny should be modified or overruled.

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4. This point requires further explanation, but due to the limit on the length of certiorari-stage *amicus* briefs, it will have to wait for the merits stage. Also deferred is a discussion of why *Lockett* meets the criteria for overruling a precedent.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

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Respectfully submitted,

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